

# The Journal of Business, Entrepreneurship & the Law

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Volume 5 | Issue 1

Article 4

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11-15-2011

## Violence is Never the Answer, Or Is It? Constitutionality of California's Violent Video Game Regulation

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### Recommended Citation

Laura Black, *Violence is Never the Answer, Or Is It? Constitutionality of California's Violent Video Game Regulation*, 5 J. Bus. Entrepreneurship & L. Iss. 1 (2011)  
Available at: <http://digitalcommons.pepperdine.edu/jbel/vol5/iss1/4>

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# VIOLENCE IS NEVER THE ANSWER, OR IS IT? CONSTITUTIONALITY OF CALIFORNIA’S VIOLENT VIDEO GAME REGULATION

LAURA BLACK\*

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## ABSTRACT

In 2011, the United States Supreme Court ruled that the California law proscribing the sale of violent video games to minors violated the First Amendment and was, therefore, unconstitutional. Because this is the first video game case to be heard by the Supreme Court, the decision marked a significant milestone for the video game and entertainment industries. The beginning of this note will review the history leading up to the passage of the law as well as examine previous attempts by other states to regulate the distribution of violent video games to minors. Most importantly, this note will explore the Supreme Court’s opinion in *Brown v. Entertainment Merchants Association* including the Court’s analysis of the applicable constitutional law. Lastly, this note will examine the California law’s potential impact on the video game industry had it been deemed constitutional.

## I. INTRODUCTION

A man holding a gasoline can stands in the middle of a mall. Suddenly, he begins pouring the contents of the can onto the floor and onto people waiting patiently in line to meet a celebrity. Then, the man lights a match and throws it onto the trail of gasoline igniting the blaze. People begin to burst into flames as screams and cries of pain erupt. The man who started it all, then pulls out a gun

and takes aim at the flame engulfed figures that have become scattered around the mall. He then proceeds to use the flaming bodies as target practice. After the flames have burned out, the villain leaves the mall, walking over the charred corpses. He makes his way to a church, where he proceeds to the confessional and his voice echoes, “Bless me father for I have *really* sinned . . .” At this time, he pulls out his gun and begins firing shots at the priest through the partition.<sup>1</sup>

The Supreme Court has ruled that the video game described above cannot be proscribed from minors despite its violent content.<sup>2</sup> While the imagery may be disturbing, it is just one of the many scenarios that play out in the video game, *Postal 2*.<sup>3</sup> The Supreme Court’s holding rendered such interactive violence as fully protected by the First Amendment, and more importantly, that it is unconstitutional to prohibit the sale of these types of violent video games to minors.<sup>4</sup>

In 2005, California passed legislation intended to prevent such games from being distributed to minors.<sup>5</sup> *Postal 2*, however, is the only video game that was clearly identified as banned under California’s statute.<sup>6</sup> Although California has been permanently enjoined from enforcing the law since 2005,<sup>7</sup> the State successfully appealed the case all the way to the United States Supreme Court in 2010.<sup>8</sup> In its most recent term, the Supreme Court heard oral arguments from both

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<sup>1</sup> BonersGames, *Postal 2 – Share the Pain – Tuesday [2/2]*, YOUTUBE.COM (Aug. 16, 2007), [http://www.youtube.com/watch?v=nmA\\_LmAy7mY&feature=related](http://www.youtube.com/watch?v=nmA_LmAy7mY&feature=related).

<sup>2</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011).

<sup>3</sup> Brief of Petitioner-Appellant, *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009) (No. 08-1448).

<sup>4</sup> *Brown*, 131 S.Ct. at 2729.

<sup>5</sup> See CAL. CIV. CODE §§1746–1746.5 (West 2005).

<sup>6</sup> In California’s brief on petition for certiorari, the State reports other scenes of violence demonstrated in *Postal 2*. Petition for Writ of Certiorari at 46–47, *Schwarzenegger*, 556 F.3d 950 (No. 08-1448). Specifically, the game features scenes of:

[T]orturing images of young girls, setting them on fire, and bashing their brains out with a shovel, for no reason other than to accumulate more points in the game. In one scene . . . the player . . . looks through a scope on an assault rifle and sees a very realistic image of a person’s face. The player then shoots the victim in the kneecap. As the player watches the victim attempt to crawl away, moaning in pain, the player pours gasoline on the victim and lights him on fire. As the burning victim continues to crawl, the player urinates on the victim, and says “That’s the ticket.” After noting that it “smells like chicken,” the player again looks at the victim through the scope on the gun, and again sees a realistic human face, on fire, crawling toward him. The player then shoots the victim in the face, which turns into charred remnants of a human image. In another scene, the player hits a woman in the face with a shovel, causing blood to gush from her face. As she cries out and kneels down, the player hits her twice more with the shovel, this time decapitating her. The player then proceeds to hit the headless corpse several more times, each time propelling the headless corpse through the air while it continues to bleed.

*Id.*

<sup>7</sup> See *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005).

<sup>8</sup> Gregory Boyd, *Video Game Regulation and the Supreme Court: Schwarzenegger v. Entertainment Merchants Association*, GAMASUTRA 1 (Nov. 1, 2010), <http://www.gamasutra.com/view/>

the State of California and the Entertainment Merchants Association and rendered its decision on June 27, 2011.<sup>9</sup> This is the first video game case to be heard by the United States Supreme Court.<sup>10</sup> It is the goal of this note to explore the recent opinion issued by the Supreme Court as well as examine the potential impact on the video game industry if the law had been deemed constitutional. In Part II, this note reviews the history of governmental concern with portrayals of violence being viewed by minors. Part II also explains the video game ratings system and the video game industry's policy of self regulation. Part III summarizes the relevant constitutional law including the obscenity standard and the protections of the First Amendment. Part IV explores and analyzes previous attempts by other states to regulate the distribution of violent video games to minors. Part V summarizes the Ninth Circuit's decision leading up to the Supreme Court's grant of certiorari. Next, Part VI details the Supreme Court's decision and analysis including the concurring and dissenting opinions. Although, the Supreme Court ultimately affirmed California's law as unconstitutional, Part VII explores the potential affects such a law would have on the video game industry. And finally, Part VIII is a brief conclusion commenting on society's concern with violent media.

## II. BACKGROUND

### A. History of Government Involvement and Industry Self-Regulation

Public and political concern with portrayals of violence in the entertainment industry is nothing new.<sup>11</sup> Beginning in the 1990s, a number of studies and special interest groups began to emerge espousing the potentially damaging long-term effects of young people viewing violent media.<sup>12</sup> This specific concern with children viewing violence only gained momentum throughout the 1990s during which time there were a number of widely publicized incidents of teens reenacting violence they had previously witnessed,<sup>13</sup> ultimately culminating with the 1999

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feature/6191/video\_game\_regulation\_and\_the\_.php.

<sup>9</sup> See Transcript of Oral Argument, *Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (2010) (No. 08-1448); *Brown*, 131 S. Ct. 2729.

<sup>10</sup> See Stephen Totilo, *All You Need to Know About This Week's Violent Video Game Case in the U.S. Supreme Court*, GIZMODO (Nov. 1, 2010), <http://kotaku.com/5678354/all-you-need-to-know-about-this-weeks-violent-video-game-case-in-the-us-supreme-court>.

<sup>11</sup> Thomas A. Hemphill, *Self-regulation, public issue management and marketing practices in the Entertainment Industry*, 3 J. PUB. AFF. 338, 338–57 (2003), available at <http://onlinelibrary.wiley.com/doi/10.1002/pa.162/pdf>; *FTC Releases Report on the Marketing of Violent Entertainment to Children*, FEDERAL TRADE COMMISSION (Sept. 11, 2000), <http://www.ftc.gov/opa/2000/09/youthviol.shtm>.

<sup>12</sup> See Hemphill, *supra* note 11, at 339.

<sup>13</sup> See Tara Kole, *Advertising Entertainment: Can Government Regulate Advertising*, 9 UCLA ENT. L. REV. 315, 315–16 (2002). In 1995, Sarah Edmonson and her boyfriend, Benjamin Darrus, inspired by the film *Natural Born Killers*, went on a cross-country crime spree during which they paralyzed one victim and murdered another. *Id.* In 1997, a high school freshmen went on a rampage, shooting teachers and students at his school after viewing the movie, *The Basketball Diaries*. *Id.* In 1996 in Moses Lake, WA, Barry Loukaitis began shooting teachers and classmates during his algebra class and ultimately killed three people. Katherine Ramsland, *Movies Made Me Murder*, TRU TV, [http://www.trutv.com/library/crime/criminal\\_mind/psychology/movies\\_made\\_me\\_kill/4.html](http://www.trutv.com/library/crime/criminal_mind/psychology/movies_made_me_kill/4.html) (last visited Nov. 7, 2011). Loukaitis later claimed he was inspired by a music video from Pearl Jam called "Jeremy," which depicted a student taking guns to school and shooting people. *Id.*

Columbine High School shootings.<sup>14</sup> On April 20, 1999, two teenagers brought weapons to Columbine High School and began a violent siege during which they killed thirteen people (twelve students and one teacher) and wounded many others, until finally turning the guns on themselves.<sup>15</sup> Subsequent investigations into the lives of the shooters revealed their obsession with the video game, *Doom*, a first person shooter.<sup>16</sup>

As a result of this link between the shooters and a violent video game, the public outcry and concern about the effects of violent media on children was renewed prompting the government to take a closer look at regulations in the entertainment industry.<sup>17</sup> Prior to the events at Columbine, federal regulations of violence were fairly limited.<sup>18</sup> In the early '90s, concerns with expressions of violence in popular music lyrics and television programming resulted in a report by the American Psychological Association ("APA") revealing the long-term effects of children viewing violence.<sup>19</sup> The potential damage to children reported by the APA and other similar studies prompted Congressional hearings between 1994 and 1995 to decide what should be done to address these issues.<sup>20</sup> In response to these federal investigations, the major television networks agreed to take a closer look at their programming and undertake stricter policies of self-regulation.<sup>21</sup> An agreement was also reached between the television networks and the government concerning the installation of a "V-chip," which allowed parents to regulate what programs and channels their child could watch.<sup>22</sup> But after the Columbine High School shootings in 1999, these previous regulations were not enough to satisfy the governmental inquiry into the effects of children viewing violence.<sup>23</sup>

The extreme violence exhibited by the Columbine shootings prompted

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<sup>14</sup> Thomas A Hemphill, *The Entertainment Industry, Marketing Practices, and Violent Content: Who's Minding the Children?*, 108 BUS. & SOC. REV. 263, 263 (2003), available at

<http://onlinelibrary.wiley.com/doi/10.1111/1467-8594.00164/pdf> [hereinafter Hemphill II]; see also Gregory Kenyota, *Thinking of the Children: The Failure of Violent Video Game Laws*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 785, 790–92; Kole, *supra* note 13, at 316.

<sup>15</sup> James Brooke, *Terror in Littleton: The Overview; 2 Students in Colorado High School said to Gun Down as many as 23 and Kill Themselves in a Siege*, N.Y. TIMES (April 21, 1999), <http://www.nytimes.com/1999/04/21/us/terror-littleton-overview-2-students-colorado-school-said-gun-down-many-23-kill.html?ref=columbinehighschool> (calling the event, "the deadliest school massacre in the nation's history"); see also Kenyota, *supra* note 14, at 790–91; Jennifer Rosenberg, *Columbine Massacre*, ABOUT.COM, <http://history1900s.about.com/od/famouscrimescandals/a/columbine.htm> (last visited Nov. 7, 2011) (describing the Columbine High School shootings and the shooters in detail).

<sup>16</sup> Kenyota, *supra* note 14, at 790–91. A first person shooter is a video game genre in which the player sees the game in from a first-person point of view and has a focus on shooting opponents. Niko Silvester, *First Person Shooter*, ABOUT.COM, <http://psp.about.com/od/pspglossary/g/firstpersshodef.htm> (last visited Nov. 7, 2011).

<sup>17</sup> Kenyota, *supra* note 14, at 791; Kole, *supra* note 13, 316.

<sup>18</sup> Hemphill, *supra* note 11, at 339.

<sup>19</sup> *Id.* at 339. These effects included "(1) increased aggressiveness and anti-social behavior, (2) increased fear of being or becoming a victim, (3) increased decentralization to violence and victims of violence, and (4) increased appetite for more and more violence in entertainment and real life." *Id.*

<sup>20</sup> *Id.*; see also Hemphill II, *supra* note 14, at 263.

<sup>21</sup> Hemphill II, *supra* note 14, at 264.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

President Bill Clinton to intervene.<sup>24</sup> The President called upon the Federal Trade Commission (“FTC”)<sup>25</sup> and the U.S. Department of Justice to conduct a study on the practices of the entertainment industry soliciting violence to children.<sup>26</sup> Specifically, President Clinton asked these agencies to investigate two questions: “[f]irst, do the industries promote products they themselves acknowledge warrant parental caution in venues where children make up a substantial percentage of the audience? Second, are these advertisements intended to attract children and teenagers?”<sup>27</sup> The FTC answered both of these questions in the affirmative and published a report of its findings.<sup>28</sup> In its report the FTC stated that, based on its research, “a majority of the investigations into the impact of media violence on children find that there is a high correlation between exposure to media violence and aggressive, and at times violent, behavior.”<sup>29</sup> It also found research that reported, “exposure to media violence is correlated with increased acceptance of violent behavior in others, as well as an exaggerated perception of the amount of violence in society.”<sup>30</sup>

In its report, the FTC acknowledged the positive steps taken through the self-regulation programs developed in each respective industry,<sup>31</sup> but it also found that entertainment companies often market their products to children who are not in the appropriate age group designated by the company’s own rating or label.<sup>32</sup> This contradiction between ratings and marketing tactics was the focus of the FTC’s report as well as the ease with which underage children could access materials

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<sup>24</sup> *Id.*; see also *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, FEDERAL TRADE COMMISSION, 1 (Sept. 2000), <http://www.ftc.gov/reports/violence/vioreport.pdf> [hereinafter *FTC Report 2000*] (specifically discussing the impact of the Columbine shootings on prompting government action).

<sup>25</sup> The FTC was established in 1914 with the primary purpose of preventing unfair methods of competition in business as a part of the “bust the trusts” battle. *About the Federal Trade Commission*, FEDERAL TRADE COMMISSION, <http://www.ftc.gov/ftc/about.shtm> (last visited Nov. 7, 2010). Since then, the authority of the agency has expanded and the FTC now strives to achieve:

[E]ffective law enforcement; advances consumers’ interests by sharing its expertise with federal and state legislatures and U.S. and international government agencies; develops policy and research tools through hearings, workshops, and conferences; and creates practical and plain-language educational programs for consumers and businesses in a global marketplace with constantly changing technologies.

*Id.*

<sup>26</sup> See Hemphill II, *supra* note 14, at 263. These industries specifically included the musical recording, movie, and computer and video game industries. *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Hemphill, *supra* note 11, at 340.

<sup>29</sup> *FTC Report 2000*, *supra* note 24, at ii.

<sup>30</sup> *Id.*

<sup>31</sup> Hemphill II, *supra* note 14, at 264. Each segment of the entertainment industry has established self-regulation agencies. *Id.* These include the Motion Picture Association for motion pictures, the National Association of Broadcasters for television programming, the Recording Industry Association of America for musical recordings, and the Interactive Digital Software Association and Electronic Software Rating Board for video games. *Id.*

<sup>32</sup> *FTC Report 2000*, *supra* note 24, at i.

expressly labeled for older audiences.<sup>33</sup> The FTC also mentioned the importance of implementation of such self-regulation programs by companies in the entertainment industry when “considering the First Amendment protections that prohibit government regulation of content in most instances.”<sup>34</sup> With these First Amendment protections in mind, the FTC came up with a three part conclusion to enhance the self-regulatory programs already in place.<sup>35</sup> First, the “industry should establish or expand codes that prohibit target marketing and impose sanctions for violations.”<sup>36</sup> Second, the entertainment “industry should improve the self-regulatory system compliance at the retail level.”<sup>37</sup> And lastly, the “industry should increase parental awareness of the ratings and labels.”<sup>38</sup>

Following publication of the 2000 report, Congress requested that the FTC conduct a follow up report in order to monitor the progress of the entertainment industry’s self-regulation efforts.<sup>39</sup> Since that time, the FTC has conducted and issued six follow-up reports in order to oversee the progress and practices the entertainment industry has made in preventing underage children from viewing violent media.<sup>40</sup> In its latest report, issued in December 2009, the FTC concluded that while there is room for improvement the “video game industry outpaces the movie and music industries in the three key areas that the Commission has been studying for the past decade: (1) restricting target-marketing of mature-rated products to children; (2) clearly and prominently disclosing rating information; and (3) restricting children’s access to mature-rated products at retail.”<sup>41</sup> In light of the conclusion that the video game industry has been making strides through its self-regulation efforts to prevent violent games from wrongfully being viewed by

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at ii.

<sup>35</sup> Hemphill II, *supra* note 14, at 265; *see also FTC Report 2000, supra* note 24, at 54–56.

<sup>36</sup> *FTC Report 2000, supra* note 24, at 65. With respect to this first action, the FTC recommended that the entertainment industry take measures that included prohibiting marketing of more mature rated products to audiences that are made up of a substantial percentage of persons under the age of 17, auditing ad placement to ensure these marketing limitations are actually taking place, and providing a “no buy” list to media retailers. *Id.*

<sup>37</sup> *Id.* at 66. The FTC listed several methods that industry members as well as third party retailers should practice including checking identification or requiring parental permission prior to selling or renting mature labeled titles, avoiding sales on websites unless they have a reliable age verification system, and finally, establishing guidelines for electronic transfer of media so that such transfers do not undermine the use of parental advisory labels. *Id.*

<sup>38</sup> *Id.* To accomplish this goal, the FTC recommended that ratings or advisory labels and descriptors should be clearly displayed in all ads and on all packaging. In addition, labeling and rating information should be included in reviews and ratings should be displayed anywhere media can be sampled, purchased or downloaded including the Internet. *Id.*

<sup>39</sup> *See Hemphill II, supra* note 14, at 265.

<sup>40</sup> All the reports can be accessed via the Federal Trade Commission’s website under the *Commission and Staff Reports* page. The overall organization and structure of the reports are consistent and include a specific section for the three investigated industries: motion pictures, music recording, and electronic games. *Marketing Violent Entertainment to Children: A Sixth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, FEDERAL TRADE COMMISSION, 1 (Dec. 2009), <http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf> [hereinafter *FTC Follow-Up Report 2009*]; *see generally Commission and Staff Reports*, FEDERAL TRADE COMMISSION, <http://www.ftc.gov/reports/index.shtm> (last visited Nov. 7, 2011).

<sup>41</sup> *FTC Follow-Up Report 2009, supra* note 40, at 30.

underage children, it seems California's legislation banning the sale of violent games to minors is an overreaction.<sup>42</sup>

### *B. The Video Game Industry and Ratings*

There is no denying the popularity and pervasiveness of the video game industry. According to the Entertainment Software Association ("ESA"), "68% of American households now play video games, with three quarters of all gamers age 18 or older."<sup>43</sup> In 2010, video game sales totaled around \$15.5 billion, not including sales of video game consoles.<sup>44</sup> Although sales in 2010 did not increase from sales in 2009, it was still a large increase when compared to the \$11.7 billion in revenue from 2008.<sup>45</sup> Based on last year's sales, the industry has seen a rise in the sale of mobile game applications and other new technology formats.<sup>46</sup> In addition social gaming and online gaming have become increasingly popular as more people join social networks such as Facebook.<sup>47</sup> The video game industry is continually expanding as new platforms and technologies become available, such as the gesture based control system, the Kinect for Xbox 360.<sup>48</sup>

As more and more video game content is created, the more important the Entertainment Software Rating Board ("ESRB") game ratings become. The ESRB is a non-profit, self-regulatory agency that was established by the ESA in 1994.<sup>49</sup> The ESRB rating is voluntary; meaning video games are not legally required to carry an ESRB rating.<sup>50</sup> However, most retailers and distributors have policies to only carry and stock ESRB rated games.<sup>51</sup> The ESRB currently has seven ratings symbols that suggest the appropriate age for the player of the game as well as content descriptors, which indicate the presence of certain elements in a game that may be of interest or concern to parents.<sup>52</sup> The rating symbols include: Early Childhood ("EC"), Everyone ("E"), Everyone 10 and older ("E10+"), Teen ("T"), Mature ("M"), Adults Only ("AO"), and Rating Pending ("RP").<sup>53</sup> There are 30

<sup>42</sup> See *infra* notes 337–39.

<sup>43</sup> *FTC Follow-Up Report 2009*, *supra* note 40, at 23.

<sup>44</sup> Jessica Mintz, *US sales of video game content flat in 2010*, YAHOO! NEWS (Jan. 13, 2011), <http://finance.yahoo.com/news/US-sales-of-video-game-apf-2637529385.html?x=0&.v=2>.

<sup>45</sup> *Id.*; see *FTC Follow-Up Report 2009*, *supra* note 40, at 23.

<sup>46</sup> Mintz, *supra* note 44.

<sup>47</sup> See Dean Takahashi, *The top 12 trends of the video game industry*, GAMESBEAT (May 15, 2009), <http://venturebeat.com/2009/05/15/the-top-12-trends-of-the-video-game-industry/>.

<sup>48</sup> *Id.*

<sup>49</sup> *ESRB Frequently Asked Questions*, ENTERTAINMENT SOFTWARE RATING BOARD, <http://www.esrb.org/ratings/faq.jsp#1> (last visited Nov. 7, 2011).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Game Ratings & Descriptor Guide*, ENTERTAINMENT SOFTWARE RATING BOARD, [http://www.esrb.org/ratings/ratings\\_guide.jsp#rating\\_symbols](http://www.esrb.org/ratings/ratings_guide.jsp#rating_symbols) (last visited Nov. 7, 2011).

<sup>53</sup> *Id.* Early Childhood ratings are suitable for children ages 3 and over, and contain no content that a parent would find inappropriate. *Id.* Titles rated for Everyone contains content suitable for children ages 6 and over, and such titles can contain minimal cartoon or fantasy violence as well as mild language. *Id.* Everyone 10 and older ratings indicate the content is appropriate for children ages 10 and over, but may contain mild violence and language. *Id.* Teen rated titles are appropriate for children ages 13 and older and may contain "violence, suggestive themes, crude humor, minimal blood,



different content descriptors that cover a range of elements from violence and sexual content to alcohol and drug use.<sup>54</sup> The purpose of such content descriptors is to provide consumers with additional information about content in the game, but they are not intended to list every type of content in a game that a player might encounter.<sup>55</sup> Furthermore, the absence of a content descriptor does not necessarily mean that type of content is completely nonexistent in the game, and such descriptors do not “always refer to precisely the same type or intensity of material depending on the rating category that accompanies it.”<sup>56</sup> Thus, the meaning of the content descriptors is dependent upon the rating of the game.

Over the past five years, M-rated video games have only accounted for an average of 9% of total video game sales.<sup>57</sup> E-ratings, however, have taken up nearly 51% of game sales in the same time period.<sup>58</sup> T-rated titles average 23% of sales while E10+ rated games average 17% of sales.<sup>59</sup> In addition, almost every year E-rated titles outsell both M-rated and T-rated titles combined.<sup>60</sup> Although E-rated titles consistently take up a majority of the market sales, the number one selling game in 2010 was an M-rated game called *Call of Duty: Black Ops*.<sup>61</sup> This game sold more than twelve million units in the United States, which was nearly double the sales of the next best selling game, *Madden NFL 11*, an E-rated game.<sup>62</sup> Of the top ten selling games across all platforms for 2010, <sup>63</sup> five titles were rated M, while four titles were rated E and one title was rated E10+.<sup>64</sup> These sales

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simulated gambling, and/or infrequent use of strong language.” *Id.* Mature rated titles are intended for audiences 17 and older, and often include violence, blood and gore, sexual content and strong language. *Id.* Adults only ratings are intended only for audiences 18 and over, and may contain “prolonged scenes of intense violence and/or graphic sexual content and nudity.” *Id.* Lastly, rating pending symbol refers to titles that have been submitted to the ESRB, but have not yet received a final rating. *Id.* The RP rating only occurs in advertisements for games that have not yet been released. *Id.*

<sup>54</sup> See *Id.* Often content descriptors are preceded by the term “Mild,” which means that the type of content is low in frequency or intensity. *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See ESRB *Frequently Asked Questions*, *supra* note 49.

<sup>57</sup> Ben Reeves, *Rated for Sale*, GAMEINFORMER, Nov. 2010, at 23.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Jim Reilly, *The Best Selling Games of 2010*, IGN (Jan. 14, 2011), <http://wii.ign.com/articles/110/1107080p1.html>.

<sup>62</sup> *Id.*; *Madden NFL 11*, IGN, <http://wii.ign.com/objects/043/043556.html> (last visited Nov. 7, 2011).

<sup>63</sup> “Across all platforms” means games play on all game consoles including Xbox 360, PlayStation 3, PlayStation 2, and Wii, as well as personal computers (PC) and portable game players.

<sup>64</sup> Reilly, *supra* note 61; *Rating Information: Halo Reach*, ESRB, <http://www.esrb.org/ratings/synopsis.jsp?Certificate=29447> (last visited Nov. 11, 2011); *Rating Information: New Super Mario Bros. Wii*, ESRB, <http://www.esrb.org/ratings/synopsis.jsp?Certificate=27877> (last visited Nov. 11, 2011); *Rating Information: Red Dead Redemption*, ESRB, <http://www.esrb.org/ratings/synopsis.jsp?Certificate=28989> (last visited Nov. 11, 2011); *Rating Information: Wii Fit Plus*, ESRB, <http://www.esrb.org/ratings/synopsis.jsp?Certificate=27003> (last visited Nov. 11, 2011); *Rating Information: Just Dance 2*, ESRB, <http://www.esrb.org/ratings/synopsis.jsp?Certificate=29739&searchkeyword=just+dance+2> (last visited Nov. 11, 2011); *Rating Information: Call of Duty: Modern Warfare 2*, ESRB, <http://www.esrb.org/ratings/synopsis.jsp?Certificate=27566> (last visited Nov. 11, 2011); *NBA 2K11-final boxart*, ESRB rating, GO NINTENDO (Sept. 27, 2010), <http://gonintendo.com/viewstory.php?id=137420>.

figures show that while M-rated titles may only account for about 10% of total video game sales, such titles are still widely popular and fly off the shelves.

The difficulty with California's legislation is that it does not take the ESRB ratings into account when classifying games as "violent." Thus, content given a T-rating by the ESRB, may still be considered a "violent video game" under California's statute. Such contradictory determinations between the state and the ESRB would most likely create vast consumer confusion. Additionally, the ambiguity in the process of determining what games are considered regulated for the purposes of California's law will most certainly lead to self-censoring by the video game industry, which will not want to risk prosecution.<sup>65</sup>

### C. Legislative History

California Civil Code §§1746-1746.5 were signed into law by Governor Arnold Schwarzenegger in 2005.<sup>66</sup> However, the Video Software Dealers Association ("VSDA") and the Entertainment Merchants Association ("EMA") brought a suit in the Northern District of California against the state seeking to permanently enjoin enforcement of the law.<sup>67</sup> Subsequently, VSDA and EMA filed a motion for summary judgment, which the court granted.<sup>68</sup> California filed a timely appeal in the Ninth Circuit to reverse the district court's decision.<sup>69</sup> The State argued that the California statute constitutionally regulated the distribution of violent video games.<sup>70</sup> The Ninth Circuit, however, disagreed and affirmed the district court's order in 2009.<sup>71</sup> The State of California once again appealed to the Supreme Court of the United States, and, somewhat surprisingly, the petition for certiorari was granted.<sup>72</sup>

On November 2, 2010, the Supreme Court heard the case.<sup>73</sup> Deciding whether the statute adequately describes the types of games to be regulated is only one problem the Supreme Court must address in its decision. Additionally, the Court must determine whether California's statute is unconstitutional based on whether it violates the First Amendment and whether it is invalid on vagueness

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<sup>65</sup> See *infra* text accompanying notes 364–402.

<sup>66</sup> CAL. CIV. CODE §§ 1746–1746.5.

<sup>67</sup> Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 955–56 (9th Cir. 2009).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 952–53.

<sup>70</sup> *Id.* at 967.

<sup>71</sup> *Id.*

<sup>72</sup> See Ben Parfitt, *US: Concern builds over new game laws*, MCV (July 6, 2010), <http://www.mcvuk.com/news/39887/US-Concern-builds-over-new-game-laws> (quoting Take Two's Strauss Zelnick as saying, "[i]t's very, very surprising that the Supreme Court is hearing the case."). Strauss Zelnick is the former chairman of Take Two Incentive, a large video game publisher. Dean Takahashi, *Take-Two's Strauss Zelnick talks about games beyond Grand Theft Auto*, GAMEBEAT.COM (June 17, 2009), <http://venturebeat.com/2009/06/17/take-twos-strauss-zelnick-talks-about-games-beyond-grand-theft-auto/>. Take Two publishes the popular Grand Theft Auto Series. *Id.*

<sup>73</sup> During the oral arguments before the U.S. Supreme Court, Justice Kagan cited *Postal 2* as the only clearly identifiable example of the type of video game California's law seeks to ban, "but presumably the statute applies to more than one video game." Transcript of Oral Argument at 11–12, *Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (2010) (No. 08-1448) (argued Nov. 2, 2010).

grounds.

### III. CONSTITUTIONAL LAW AND THE OBSCENITY STANDARD

The First Amendment ensures that “Congress shall make no law . . . abridging the freedom of speech.”<sup>74</sup> Although the definition of speech under the Constitution is continually expanding, there are recognized freedoms that fall within this category. These include the freedom to speak, the freedom to read, the freedom to write, and freedom of thought.<sup>75</sup> Within all of these protected freedoms is the freedom of expression. In protecting this right, the Court has stated, “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.”<sup>76</sup>

In evaluating whether video games are expressive and therefore protected, many of the circuit and district courts have concluded that video games fulfill the requirements for expression.<sup>77</sup> When determining whether certain conduct is expressive for the purpose of First Amendment protection, the court must consider “whether an intent to convey a particularized message is present, and whether the likelihood is great that the message would be understood by those who viewed it.”<sup>78</sup> Because video games contain elements of “original artwork, graphics, music, storylines and characters similar to movies and television shows,” courts have ruled that they are forms of expression. This qualifies them as deserving of First Amendment protection.<sup>79</sup>

Not all categories of expression, however, are protected by the First Amendment,<sup>80</sup> such as the category of obscenity.<sup>81</sup> The U.S. Supreme Court first held that obscenity was not within the category of constitutionally protected speech in *Roth v. United States*.<sup>82</sup> In *Roth*, the defendant was found to be in violation of California’s obscenity statute for disseminating obscene advertisements through the mail.<sup>83</sup> Roth challenged the statute as unconstitutional, but the Supreme Court upheld the ruling on the basis that obscenity is not protected by the First

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<sup>74</sup> U.S. CONST. amend. I. The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. See *Gitlow v. New York*, 268 U.S. 652 (1925). As such, when states challenge the First Amendment, they also often include a challenge to the Fourteenth Amendment based on the doctrine of incorporation.

<sup>75</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Wieman v. Updegraff*, 344 U.S. 183, 193 (1952).

<sup>76</sup> *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002).

<sup>77</sup> See *Entm’t Merchs. Ass’n v. Henry*, 2007 WL 2743097, at \*2 (W.D. Okla. Sept. 17, 2007); *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 651 (E.D. Mich. 2006); *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1184 (W.D. Wash. 2004). But see *James v. Meow Media, Inc.*, 300 F.3d 683, 696 (6th Cir. 2002) (finding that an extension of the “First Amendment protection to video games certainly presents some thorny issues”).

<sup>78</sup> *Nordyke v. King*, 319 F.3d 1185, 1189 (9th Cir. 2003).

<sup>79</sup> *Granholm*, 426 F. Supp. 2d at 651.

<sup>80</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

<sup>81</sup> *Roth v. United States*, 354 U.S. 476, 480 (1957) (declaring that “this Court has always assumed that obscenity is not protected by the freedoms of speech and press.”).

<sup>82</sup> *Id.* at 485.

<sup>83</sup> *Id.* at 480.

Amendment right to free speech.<sup>84</sup> While the Court distinguished obscenity from sex, it defined obscene materials as those which, “deal[] with sex in a manner appealing to the prurient interest.”<sup>85</sup> For example, portrayals of sex in art and literature are not inherently obscene, rather, it is the effect that certain sexual materials incite lustful thoughts that makes them obscene.<sup>86</sup>

Recently, obscenity has been defined as limited to “[o]nly ‘works which depict or describe sexual conduct’ are considered obscene and therefore unprotected.”<sup>87</sup> The standard for obscenity was established by the Supreme Court in the case of *Miller v. California*.<sup>88</sup> In *Miller*, the Court reviewed the constitutionality of a California statute that criminalized the dissemination of sexually explicit materials.<sup>89</sup> The Court recalled the established definition of obscenity as “material which deals with sex in a manner appealing to prurient interest.”<sup>90</sup> Because obscenity is unprotected by the First Amendment, the Court explained that states can regulate such materials provided that the law is limited to “works, which taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”<sup>91</sup> The Court then proceeded to establish the three part test for obscenity, which requires determining:

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>92</sup>

The Court, however, qualified its holding by acknowledging the “inherent dangers of undertaking to regulate any form of expression.”<sup>93</sup>

While the Supreme Court has applied the First Amendment protections to all persons equally, it has recognized the need to expand the definition of obscenity with respect to minors.<sup>94</sup> In *Ginsberg v. New York*, the Supreme Court upheld a New York statute that regulated the sale of sexual materials to minors, despite the finding that the materials were not obscene as to adults.<sup>95</sup> The Court explained that, “material which is protected for distribution to adults is not necessarily

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<sup>84</sup> *Id.* at 493.

<sup>85</sup> *Id.* at 487.

<sup>86</sup> *Id.*

<sup>87</sup> *Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1185 (W.D. Wash. 2004).

<sup>88</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>89</sup> *Id.* at 18–19.

<sup>90</sup> *Id.* at 20 n.2 (quoting *Roth*, 354 U.S. at 487).

<sup>91</sup> *Id.* at 24.

<sup>92</sup> *Id.* (internal citations omitted).

<sup>93</sup> *Id.* at 23.

<sup>94</sup> *See Ginsberg v. New York*, 390 U.S. 629 (1968).

<sup>95</sup> *Id.* at 635, 637.

constitutionally protected from restriction upon its dissemination to children.”<sup>96</sup> Furthermore, “the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined.”<sup>97</sup> Thus, the Court established a separate standard of obscenity with respect to minors and, therefore, New York’s law did not violate the constitutionally protected freedoms of such minors.<sup>98</sup>

More recently, in the context of video games, many states have repeatedly attempted to rely on the Court’s ruling in *Ginsberg* to support the proposed extension of obscenity with respect to minors to include violent content.<sup>99</sup> Because, however, the definition of obscenity does not include violence, this strategy has not been successful. District and circuit courts continue to reinforce the distinction between the unprotected category of obscenity and the constitutionally protected category of violence.<sup>100</sup>

Regulations on content protected by the First Amendment are typically held to a high standard of review. The first step in reviewing laws regulating free speech is determining whether the regulation is content-based or content-neutral. Content-based regulations attempt to limit the actual message of the “speech,” while content-neutral regulations refer to statutes that are intended to protect the public in general, but incidentally impact speech.<sup>101</sup> The statutes regulating the distribution of violent video games are content-based regulations because they are restricting the games based on their content. Content-based regulations are presumptively invalid and therefore require application of the strict scrutiny standard of review.<sup>102</sup>

In order for a law to be upheld under strict scrutiny review, it must be “narrowly tailored to promote a compelling Government interest.”<sup>103</sup> Additionally, this analysis requires a determination of whether there is a less restrictive alternative that would serve the same government interest.<sup>104</sup> With respect to the requirement of having a compelling state interest, the government must prove that “the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>105</sup> Courts have repeatedly found that statutes regulating the sale of violent video games do not survive the high standard of strict scrutiny review, either on the basis

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<sup>96</sup> *Id.* at 636 (quoting William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 85 (1960)).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 638.

<sup>99</sup> These states include Michigan, Washington, Louisiana, Indiana, and Missouri.

<sup>100</sup> See *Interactive Digital Software Ass’n v. St. Louis County*, 329 F. 3d 954, 958 (8th Cir. 2003); *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 575–76 (7th Cir. 2001); *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1185 (W.D. Wash. 2004).

<sup>101</sup> See *R.A.V. v. City of Paul*, 505 U.S. 377, 385–86 (1992). Example of a content-based regulation as opposed to a content-neutral regulation is that an ordinance banning fires is content-neutral while an ordinance banning burning the flag is content-based. *Id.* at 385.

<sup>102</sup> *Id.* at 382.

<sup>103</sup> *United States v. Playboy Entm’t Group*, 529 U.S. 803, 813 (2000).

<sup>104</sup> *Id.*

<sup>105</sup> *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 664 (1994).

that the alleged governmental interest is not valid or that, despite the existence of a compelling interest, there are less restrictive alternatives available.<sup>106</sup>

#### IV. ANALYSIS OF OTHER CIRCUIT AND DISTRICT COURT DECISIONS

California's attempted ban on the sale of violent video games is just one in a long line of attempts by state and local governments to regulate the distribution of violent video games to minors.<sup>107</sup> In the last decade alone, there have been twelve cases brought before the federal courts to decide the constitutionality of state and local laws prohibiting the distribution of violent video games to minors.<sup>108</sup> Despite the variation in the language of the enacted statutes, the circuit and district courts have unanimously held that these regulations on the distribution of certain video games based on their violent content is unconstitutional under a strict scrutiny standard of review.

Starting in 2000, the City of Indianapolis enacted an ordinance that limited the access of minors to violent video game content.<sup>109</sup> The ordinance specifically forbade any operator of five or more video-game machines in one place, namely arcade operators, from allowing an unaccompanied minor to use a machine that would be "harmful to minors."<sup>110</sup> The term "harmful to minors" was defined as meaning that which, "appeals to minors' morbid interest in violence or minors' prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen," and contains, "graphic violence" or "strong sexual content."<sup>111</sup> The ordinance also required that such operators post appropriate warning signs and separate, by partition, "harmful" machines from other machines at that location.<sup>112</sup> This includes concealing the viewing areas from persons on the other side of the partition.<sup>113</sup> Lastly, the ordinance included provisions addressing the appropriate punishment for violations of the legislation, which included monetary penalties, and the revocation or suspension of the right to operate such machines.<sup>114</sup>

In drafting this legislation, the City of Indianapolis cited studies that showed young people who played violent video games "display[ed] higher levels of hostility and anxiety, and that children who play violent video games repeatedly

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<sup>106</sup> See *infra* Part IV.

<sup>107</sup> See generally *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 958 (8th Cir. 2003); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 575 (7th Cir. 2001); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 653 (E.D. Mich. 2006); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1185 (W.D. Wash. 2004).

<sup>108</sup> See *infra* Part IV in its entirety.

<sup>109</sup> See *Kendrick*, 244 F.3d at 573.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* The ordinance further defined "graphic violence" as that representing, "realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfigurement." *Id.*

<sup>112</sup> *Id.* Operators of less than five machines are subject to all, but the partition requirements. *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

are conditioned to overcome built-in resistance to acting out violently in response to these emotions.”<sup>115</sup> In addition, these studies showed that children often play out violent scenes they view in video games and develop motor skills required to carry out violent fantasies.<sup>116</sup>

The ordinance, however, never went into effect since video game manufacturers and their trade association brought suit to enjoin enforcement of the law as a violation of the First Amendment.<sup>117</sup> The district court, however, found that the ordinance did not violate the plaintiff manufacturer’s constitutional rights, and on appeal, the Seventh Circuit reversed the decision finding that the ordinance significantly restricts expression without any compelling justification.<sup>118</sup> Upon rendering its decision, the Seventh Circuit stated that, “[v]iolence and obscenity are distinct categories of objectionable depiction.”<sup>119</sup> The importance of this distinction is that obscene materials are unprotected by the First Amendment because they are offensive, as opposed to the violent content in the regulated video games, which supposedly engenders harm on young children.<sup>120</sup> The court admits that “[p]rotecting people from violence is at least as hallowed a role for government as protecting people from graphic imagery”; however, “[t]o shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming.”<sup>121</sup> In his opinion, Justice Posner acknowledges that video games may be different than other media because of their interactivity, but ultimately this distinction is erroneous since “all literature . . . is interactive; the better it is, the more interactive.”<sup>122</sup> As such, the Seventh Circuit determined that the benefits of the Indianapolis ordinance were, at best, conjectural and therefore did not justify the city’s regulation on violent video games.<sup>123</sup> The city tried to appeal the decision by writ of certiorari to the United States Supreme Court, but this petition was subsequently denied.<sup>124</sup>

Less than two years later, the Interactive Digital Software Association, along with other video game publishers and retailers, brought suit to enjoin the enforcement of St. Louis County Ordinance No. 20,193, which made it “unlawful for any person knowingly to sell, rent, or make available, graphically violent video games to minors, or to ‘permit the free play of’ graphically violent video games by

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<sup>115</sup> *Exec. Order No. 1, Prohibition of Violent Video Games With Violent Content From City Rights-of-Way And Public Property*, CONSOLIDATED CITY OF INDIANAPOLIS AND MARION COUNTY (Mar. 13, 2000), [http://www.indygov.org/eGov/City/OCC/Documents/EO\\_1\\_2000.pdf](http://www.indygov.org/eGov/City/OCC/Documents/EO_1_2000.pdf).

<sup>116</sup> *Id.*

<sup>117</sup> *Kendrick*, 244 F.3d at 573.

<sup>118</sup> *Id.* at 579.

<sup>119</sup> *Id.* at 574.

<sup>120</sup> *Id.* at 575.

<sup>121</sup> *Id.* at 575, 577.

<sup>122</sup> *Id.* at 577.

<sup>123</sup> *Id.* at 581. In addition, the court recognized the “irreparable harm” such an ordinance would have on the plaintiff manufacturers because of the cost of altering their facilities and the loss of revenue. *Id.* In accordance with this order, the city was ordered to pay the arcade industry \$318,000 for attorney’s fees. *Essential Facts: About Video Games and Court Rulings*, ENTERTAINMENT SOFTWARE ASSOCIATION, 9, <http://www.theesa.com/facts/pdfs/EFCourtsandRulings2010.pdf> (last visited Feb. 13, 2011).

<sup>124</sup> *Kendrick*, 244 F.3d at 573.

minors, without a parent or guardian's consent."<sup>125</sup> The plaintiff companies argued that the ordinance was unconstitutional based on its violation of the First Amendment, however, the district court rejected this argument by concluding that, "video games were not a protected form of speech under the First Amendment."<sup>126</sup>

The plaintiff companies appealed the decision to the Eighth Circuit,<sup>127</sup> which reversed the district court's findings after applying a strict scrutiny review to the St. Louis County ordinance.<sup>128</sup> In its analysis, the Eighth Circuit first addressed the district court's error in categorizing video games as a new medium that falls outside the protections of the First Amendment.<sup>129</sup> The court stated that:

If the first amendment is versatile enough to "shield [the] painting of Jackson Pollock,<sup>130</sup> music of Arnold Schoenberg,<sup>131</sup> or Jabberwocky verse of Lewis Carroll,"<sup>132</sup> we see no reason why the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games are not entitled to similar protection.<sup>133</sup>

In continuing its discussion that video games are validly protected by the First Amendment, the Eighth Circuit also stated that the fact that video games are interactive does not make them any less protected.<sup>134</sup> To support this conclusion, the Eighth Circuit drew on the Seventh Circuit's opinion in *Kendrick*, finding that "literature is most successful when it 'draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.'"<sup>135</sup>

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<sup>125</sup> *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 956 (8th Cir. 2003).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* It is significant to note that on appeal, the plaintiffs did not challenge the ordinance's restrictions on minors' access to video games with strong sexual content. *Id.*

<sup>128</sup> *Id.* at 960.

<sup>129</sup> *Id.* at 957 (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995)).

<sup>130</sup> Jackson Pollock was an American painter, best known for his work in the style of Abstract Expressionism, an art form characterized by free-associative gestures, often called "action painting." See Francis Valentine O'Connor, *Jackson Pollock Biography*, BIOGRAPHY.COM, 1, <http://www.biography.com/articles/Jackson-Pollock-9443818?part=0> (last visited Nov. 8, 2011). His most famous works were the product of the "pouring" technique, which was the process of pouring or dripping paint onto a canvas. *Id.* at 2. The intensity of this technique earned him the nickname "Jack the Dripper" by Time magazine. *Id.* A catalogue of Jackson Pollock's works can be viewed online. See *Jackson Pollock*, THE ARTCHIVE, <http://www.artchive.com/artchive/P/pollock.html> (last visited Nov. 8, 2011).

<sup>131</sup> Arnold Schoenberg was a musical composer who was born in Vienna and was most recognized for his creation of a new method of composition, known as atonality. *Biography of Arnold Schoenberg*, CLASSICCAT.NET, [http://www.classiccat.net/schoenberg\\_a/biography.php](http://www.classiccat.net/schoenberg_a/biography.php) (last visited Nov. 14, 2011). His compositions are available on iTunes.

<sup>132</sup> "Jabberwocky" is a poem by Lewis Carroll that was incorporated into Carroll's novel, *Through the Looking Glass*. See Linda Sue Grimes, *Lewis Carroll's 'Jabberwocky': Sense and Nonsense*, SUITE101 (April 13, 2007), <http://lindasuegrimes.suite101.com/lewis-carrolls-jabberwocky-a18615>. The Jabberwocky verse is considered an important nonsense poem that exemplifies Carroll's mastery of language in that the poem is seemingly nonsensical, but upon closer analysis actually tells an intelligent story. *Id.*

<sup>133</sup> *Interactive Digital Software Ass'n*, 329 F.3d at 957.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* (quoting *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001)).



After determining that video games are a protected media under the First Amendment, the Eighth Circuit went on to state that the appropriate level of review for the ordinance was that of strict scrutiny since the proposed regulation was content-based.<sup>136</sup> Furthermore, the circuit court rejected St. Louis County's argument that graphic violence in video games was a part of the category of obscenity with respect to minors and therefore entitled to less constitutional protection.<sup>137</sup>

Content-based regulations of speech must be justified by a compelling state interest and the law must be narrowly tailored to advance this interest.<sup>138</sup> In applying this standard, the Eighth Circuit assessed the two compelling state interests put forth by St. Louis County: (1) that it has an interest in protecting the "psychological well-being of minors," and (2) that it has an interest in "assisting parents to be the guardians of their children's well-being."<sup>139</sup>

With respect to the county's first interest, the Eighth Circuit found that while protecting the well-being of minors was a compelling state interest in the "abstract," there must be solid proof that such an interest is threatened.<sup>140</sup> Essentially, the county "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."<sup>141</sup> Although the county presented evidence of a study that indicated playing violent video games frequently leads to aggressive thoughts and behavior, the Eighth Circuit determined that this was not conclusive empirical evidence that violent video games cause psychological harm to minors.<sup>142</sup> In the absence of such substantial evidence, the circuit court concluded that the county's regulation on the sale and rental of violent video games could not be justified.<sup>143</sup>

In analyzing the county's second compelling interest, the Eighth Circuit agreed that a parent's authority to direct the rearing of their children is a fundamental part of society; however, the real issue was whether it was constitutionally permissible for First Amendment rights to be limited in order to aid such parental authority.<sup>144</sup>

In support of this compelling state interest the county cited to *Ginsberg*, in which the Supreme Court found that the State of New York could regulate the sale of obscene material to minors.<sup>145</sup> Based on its finding that such material was considered obscene with respect to minors, the Supreme Court applied the rational

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<sup>136</sup> *Id.* at 958.

<sup>137</sup> *Id.* "Simply put, depictions of violence cannot fall within the legal definition of obscenity for either minors or adults." *Id.*

<sup>138</sup> *See* *R.A.V. v. St. Paul, Minn.*, 505 U.S. 377, 382–83 (1992). The reason for this is that "content based regulations are presumptively invalid." *Id.* at 382.

<sup>139</sup> *Interactive Digital Software Ass'n*, 329 F.3d at 958, 959.

<sup>140</sup> *Id.* at 958.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 959.

<sup>145</sup> *Ginsberg v. New York*, 390 U.S. 629, 631 (1968).

basis level of review to the New York regulation.<sup>146</sup> The Eighth Circuit distinguished *Ginsberg* from the county ordinance based on the determination that *Ginsberg* involved speech that was not protected by the First Amendment, whereas the violent video games in the present case were considered protected.<sup>147</sup> As such, the Eighth Circuit refused to apply the “less exacting” standard of the rational basis test in evaluating the constitutionality of the St. Louis ordinance.<sup>148</sup> Furthermore, the Eighth Circuit stated that in neither *Ginsberg*, nor any other case for that matter, did the Supreme Court allow the government’s interest in helping parents protect their children’s well-being justify the regulation of what minors read and watch.<sup>149</sup>

Based on this interpretation of *Ginsberg*, the Eighth Circuit clarified its holding by saying, “[w]e do not mean to denigrate the government’s role in supporting parents, or the right of parents to control their children’s exposure to graphically violent materials. We merely hold that the government cannot silence protected speech by wrapping itself in the cloak of parental authority.”<sup>150</sup> As such, the circuit court determined that finding an interest in parental aide compelling would “invite legislatures to undermine the first amendment rights of minors willy-nilly under the guise of promoting parental authority.”<sup>151</sup> Therefore, the St. Louis ordinance regulating the sale of violent video games was deemed unconstitutional.<sup>152</sup>

In 2003, the Washington State Legislature passed a law prohibiting the sale or rental of any violent video games that depicted harm to a human form that was recognizable as a law enforcement officer.<sup>153</sup> A number of the companies and associations that create, publish, distribute, sell, or rent video games brought suit in the district court as plaintiffs to enjoin enforcement of the law based on the argument that it violated the First Amendment.<sup>154</sup>

In its analysis of the constitutionality of the Washington law, the district court first addressed whether video games were actually protected by the First Amendment. To make this determination, the court considered “whether an intent to convey a particularized message is present, and whether the likelihood is great that the message would be understood by those who viewed it.”<sup>155</sup> The district court acknowledged that early video games probably lacked the requisite “expressive element”; however, today’s games often involve story lines, original scores, and complex narratives, which require the player to make choices and gain

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<sup>146</sup> *Id.* at 639–43.

<sup>147</sup> *Interactive Digital Software Ass’n*, 329 F.3d at 959.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 959–60.

<sup>150</sup> *Id.* at 960.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* Because of this finding, the circuit court did not reach the issue of whether the regulation was unconstitutionally vague. *Id.* As a result, the Court ordered the County to pay the plaintiffs \$180,000 for attorneys’ fees. See *Essential Facts: About Video Games and Court Rulings*, *supra* note 123, at 8.

<sup>153</sup> WASH. REV. CODE § 9.91.180 (2003).

<sup>154</sup> *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1183 (W.D. Wash. 2004).

<sup>155</sup> *Id.* at 1184 (quoting *Nordyke v. King*, 319 F.3d 1185, 1189 (9th Cir. 2003)).

experience through play.<sup>156</sup> As such, today's video games qualify as expression, and, subsequently speech, which is protected by the First Amendment.<sup>157</sup>

The defendants, represented by prosecuting attorney Norm Maleng,<sup>158</sup> argued that despite the expressiveness of video games, they fall into a category of unprotected speech, namely obscenity.<sup>159</sup> The district court addressed this argument beginning with an analysis of the Latin root for obscenity, which literally means "filth."<sup>160</sup> It also reviewed the recognized legal definition of obscenity stated by the Supreme Court in *Miller*, which includes material that is "disgusting to the senses [and] grossly repugnant to the generally accepted notions of what is appropriate."<sup>161</sup> While the district court acknowledged that graphically violent video games such as *Grand Theft Auto: Vice City* fall within the general definition of obscenity, they still do not fit within the legal definition of obscenity.<sup>162</sup> The legal definition of obscenity is limited to sexual material and is for that reason unprotected by the First Amendment.<sup>163</sup>

The district court also addressed the defendant's acknowledgement that the enacted law does not regulate content that is obscene by the legal definition.<sup>164</sup> Nevertheless, the defendants argued that the legal definition of obscenity should be expanded "to include graphic portrayals of violence."<sup>165</sup> In rejecting this argument, the district court cited not only the lack of case law supporting such a proposition, but also the different effects caused by a ban on sexually explicit content as opposed to a ban on violent content. The court reasoned that the "prevention and punishment of lewd speech has very little, if any, impact on the free expression of ideas . . . The same cannot be said for depictions of violence."<sup>166</sup>

Additionally, the district court distinguished *Ginsberg*, which the defense argued had broadened the definition of obscenity with respect to minors to include violence.<sup>167</sup> In its analysis, the district court recognized the broadening of the obscenity definition, however, it stated that, "[t]he statute at issue in *Ginsberg* did not create an entirely new category of unprotected speech; rather it adjusted the *Roth* definition of obscene material to capture that which is of sexual interest to minors."<sup>168</sup> As such, nothing less than the full protection of the First Amendment is applicable to the video games in dispute.

Following its determination that video games are entitled to full protection

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Norm Maleng was the prosecuting attorney for King County, Washington for 28 years. See Patrick Roberts, *Maleng, Norm*, HISTORYLINK.ORG (June 12, 2007), [http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file\\_id=8180](http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file_id=8180).

<sup>159</sup> *Maleng*, 325 F. Supp. 2d at 1185.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* (quoting *Miller v. California*, 413 U.S. 15, 18 (1973)).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1186.

by the First Amendment, the district court applied the traditional strict scrutiny standard of review to the statute.<sup>169</sup> In doing so, the court reviewed the two compelling interests offered by the State: “(1) ‘to curb hostile and antisocial behavior in Washington’s youth’ and (2) ‘to foster respect for public law enforcement.’”<sup>170</sup> The district court agreed that protecting the physical and psychological well-being of minors is a widely recognized compelling interest.<sup>171</sup> Nevertheless, it determined that the research presented by the State failed to show that “exposure to video games that ‘trivialize violence against law enforcement officers’ is likely to lead to actual violence against such officers.”<sup>172</sup>

Based on this finding, the court went one step further and reasoned that the lack of substantial evidence made it impossible to determine that the statute would have the intended affect on minors.<sup>173</sup> It declared that, “[e]ven if defendants were able to show a causal connection between violent video games and real-life aggression in minors, the record does not support the finding that the Act is likely to curb such aggression in a direct and material way.”<sup>174</sup>

The district court finished its strict scrutiny analysis with the conclusion that, even if the State had a compelling state interest in preventing violence and aggression in minors towards law enforcement officers, it is not the least restrictive alternative to achieving that end since it “impact[s] more constitutionally protected speech than is necessary . . . .”<sup>175</sup>

The district court did, however, contemplate whether a state could ever enact a constitutional law banning the distribution of video games to minors. It answered “‘probably yes’ if the games contain sexually explicit images . . . and ‘maybe’ if the games contain violent images, such as torture and bondage, that appeal to the prurient interest of minors.”<sup>176</sup> The court also laid out the framework for future attempts to regulate the sale of video games based on their content by listing the key considerations for such an inquiry.<sup>177</sup>

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<sup>169</sup> *Id.* The court laid out its analysis under this standard by stating that the statute “will be upheld only if defendants can show that the regulation is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that interest.” *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1186–87.

<sup>172</sup> *Id.* at 1188.

<sup>173</sup> *Id.* at 1189. The court ultimately came to this determination in its finding that the statute was both over-inclusive and under-inclusive. *Id.* It reasoned the statute was over-inclusive since it would not only ban games depicting violence against police officers, but it would also ban games depicting heroic struggles against corruption and oppression. *Id.* With respect to the problem of under-inclusion, the statute has no effect on minors’ access to other generally violent video games because it is limited to only those games that depict violence against police officers, but fails to encompass those other brutally violent games that portray violence against other people, often women and child. *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 1190.

<sup>177</sup> *See id.* These key considerations are as follows:

[D]oes the regulation cover only the type of depraved or extreme acts of violence that violate community norm and prompted the legislature to act? Does the regulation prohibit depictions of extreme violence against all innocent victims, regardless of their viewpoint or status? [A]nd do the social scientific studies support the legislative findings at issue?

Finally, the district court addressed the challenge that the statute was unconstitutionally vague, unlike previous circuit opinions.<sup>178</sup> It determined that the statute was vague based on the effects it would have on the video game industry.<sup>179</sup> Not only would overly cautious game store clerks be susceptible to withholding games from minors that were not covered by the statute, but also that video game publishers and designers would most likely be more cautious in their game design in order to ensure their game did not fall under the restrictions of the statute.<sup>180</sup> As such, the vagueness of the statute rendered it unconstitutional on these grounds as well.<sup>181</sup>

Less than a year after Washington struck down the State's attempt to regulate the distribution of violent video games, the United States District Court of the Northern District of Illinois heard a case brought by the video game industry to enjoin enforcement of an Illinois law that would regulate the sale and rental of violent video games to minors.<sup>182</sup> On July 25, 2005, the State of Illinois signed into law the Illinois Public Act 94-0315, which effectively created two new criminal statutes: the Violent Video Games Law ("VVGL") and the Sexually Explicit Video Games Law ("SEVGL").<sup>183</sup> The VVGL specifically criminalized the selling or renting of violent video games to minors including a minor's use of self-electronic checkout scanners to purchase such games.<sup>184</sup> It also required that such violent games be labeled with a two by two-inch sticker stating "18."<sup>185</sup> The statute also gave a definition for what constitutes a violent video game, which are those games that include, "depictions of or simulations of human-on-human violence in which the player kills or otherwise causes serious physical harm to another human."<sup>186</sup> Violations of the VVGL incurred fines between \$500 and \$1,000.<sup>187</sup>

The very same day the new laws were passed, various video game organizations including the VSDA and the ESA brought suit to enjoin enforcement of the laws on the grounds that the statutes violated their First Amendment rights to free speech.<sup>188</sup>

Prior to the trial, the district court held an evidentiary hearing to consider the

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*Id.*

<sup>178</sup> *See id.* at 1190.

<sup>179</sup> *Id.* at 1191.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* Based on this ruling, the district court judge ordered the state of Washington to pay the plaintiffs \$344,000 for attorney's fees. *See Essential Facts: About Video Games and Court Rulings*, *supra* note 123, at 8.

<sup>182</sup> *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1055, 1058 (N.D. Ill. 2005).

<sup>183</sup> *Id.* at 1057. The SEVGL included these same requirements. *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Violent Video Games Law, Pub. Act 94-315, 720 ILL. COMP. STAT. 5/12A-10(e) (2005), *invalidated by Blagojevich*, 404 F. Supp. 2d at 1051. The statute further defined "serious physical harm" as "depictions of death, dismemberment, amputation, decapitation, maiming, disfigurement, mutilation of body parts, or rape." *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Blagojevich*, 404 F. Supp. 2d at 1058.

effect of violent video games on younger persons. Specifically, the court focused on two main issues: (1) “whether minors who play violent video games experience an increase in aggressive thoughts, aggressive affect, and aggressive behavior,” and (2) “whether minors who play such games experience a decline in brain activity in the region of the brain that controls behavior.”<sup>189</sup>

With respect to the first issue, the court conducted an in depth review of the research presented by the State, which was mainly comprised of testimony and studies by Dr. Craig Anderson.<sup>190</sup> Based on this evidence, the court determined that, at best, Dr. Anderson’s research was inconclusive since there was nothing in his research to “establish a solid causal link between violent video game exposure and aggressive thinking and behavior.”<sup>191</sup> Furthermore, Dr. Anderson failed to eliminate the most obvious alternative explanation for the results of his findings, which is that “aggressive individuals may themselves be attracted to violent video games.”<sup>192</sup> The court also criticized the absence of any evidence in Dr. Anderson’s studies that distinguished between the effect of violent video games and the effect of other violent media, such as movies or television.<sup>193</sup> Most notably, the district court stated that, “[e]ven if one were to accept the proposition that playing violent video games increases aggressive thoughts or behavior, there is no evidence that this effect is at all significant.”<sup>194</sup>

In addressing the second issue regarding the effect of violent video games on brain activity, the court compared the conflicting testimonies of the defendant’s expert, Dr. William Kronenberger and plaintiffs’ expert, Dr. Howard Nusbaum.<sup>195</sup> Again, the court conducted an in depth review in the opinion of both doctors’ research and testimony, ultimately siding with Dr. Nusbaum and concluding that there was no basis for the determination that “minors who play violent video games are more likely to ‘[e]xperience a reduction of activity in the frontal lobes of the brain which is responsible for controlling behavior.’”<sup>196</sup>

After finding the State’s concern with the effect of violent video games on minors to be without support, the district court turned to the issue regarding the constitutionality of the VVGL.<sup>197</sup> Based on the determination that the VVGL is a

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<sup>189</sup> *Id.* at 1058–59.

<sup>190</sup> *Id.* at 1059–62. Dr. Anderson is a psychologist and professor at Iowa State University. *Id.* at 1059. Dr. Anderson’s research revealed that he had conducted a series of studies that involved one set of college students playing a violent video game and another group playing a non-violent video game, during which time the students would either administer a noise blast signaling their victory, or would hear noise blasts signaling the victory of a pretend competitor. *See* Craig A. Anderson et al., *Violent Video Games: Specific Effects of Violent Content on Aggressive Thoughts and Behavior*, 36 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 225–28 (2004).

<sup>191</sup> *Blagojevich*, 404 F. Supp. 2d at 1063.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 1062–66. Dr. William Kronenberger is a clinical psychologist at the Indiana University School of Medicine who primarily works with and studies children and adolescents with behavioral disorders. *Id.* at 1063. Dr. Howard Nusbaum is a cognitive psychologist at the University of Chicago. *Id.* at 1066.

<sup>196</sup> *Id.* at 1067 (quoting the trial transcript at 356) (internal quotation marks omitted).

<sup>197</sup> *See id.* at 1071.

content-based regulation, the court applied the strict scrutiny standard of review.<sup>198</sup> The State claimed five interests that were promoted by the VVGL, which included: (1) “preventing violent, aggressive, and asocial behavior,” (2) “preventing psychological and neurological harm to minors,” (3) “eliminating societal factors that may inhibit the physiological and neurological development of its youth,” (4) facilitating the maturation of Illinois’ children into law abiding, productive adults,” and (5) “assisting parents in protecting their children from such games.”<sup>199</sup> While the district court agreed that protecting children from violence and assisting parents were compelling state interests, it concluded that the VVGL did not meet the requirements under *Brandenburg*.<sup>200</sup> Specifically, it found there was a lack of “substantial evidence showing that playing violent video games causes minors to have aggressive feelings or engage in aggressive behavior.”<sup>201</sup>

In response to the State’s contention that the VVGL serves the compelling interest in preventing psychological harm to minors, the district court relied on the notion that our society is built on the practice of free thinking.<sup>202</sup> The court quoted Justice Jackson in stating:

“The priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error.” These concerns apply to minors just as they apply to adults.<sup>203</sup>

Thus, the district court reasoned that even if there was a compelling state interest in protecting the minds of children, the state cannot premise the regulation of free speech on how it may affect the listener, regardless of the listener’s age.<sup>204</sup>

The district court also rejected the State’s argument that the *Ginsberg* holding permits the state to regulate violent video games with respect to minors.<sup>205</sup> It distinguished *Ginsberg* on the same grounds as *Kendrick*, in that *Ginsberg* allowed the State of New York to regulate obscene materials, however, it did not give the State the authority to regulate speech that was “harmful to minors.”<sup>206</sup> As such, the VVGL could not be validated on the basis of the *Ginsberg* holding.<sup>207</sup>

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<sup>198</sup> *Id.* at 1072.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* The court recognized that speech protected by the First Amendment may still be regulated based on its content if it meets the requirements of *Brandenburg*. The speech must be “directed to inciting or producing imminent lawless action, and is likely to incite or produce such action.” *Id.* at 1073 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). The court added, “the ‘glacial process of personality development’ that video games allegedly affect ‘is far from the temporal imminent that we have required to satisfy the *Brandenburg* test.’” *Id.* at 1074 (quoting *James v. Meow Media, Inc.*, 300 F. 3d 683, 698 (6th Cir. 2002)) (internal quotation marks omitted).

<sup>201</sup> *Id.* at 1074.

<sup>202</sup> *Id.* at 1074–75.

<sup>203</sup> *Id.* (quoting *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 442–43 (1950)).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 1075–76

<sup>206</sup> *Id.* at 1076.

<sup>207</sup> *Id.* The district court also addressed the argument that the VVGL was unconstitutionally vague. *Id.* Although it agreed that the meaning of certain terminology would be clear in many instances, in the

Lastly, the court briefly addressed the VVGL and SEVGL's requirement that certain violent and sexually explicit video games be labeled with a sticker that read "18."<sup>208</sup> The court rejected the State's argument that the lower "commercial speech" standard should be applied and, <sup>209</sup> instead, determined that the labeling requirement was compelled speech subject to the higher strict scrutiny standard since such a label contains no factual information about the game.<sup>210</sup>

Based on its overall findings and the ultimate conclusion that the statutes were unconstitutional, the district court granted the plaintiffs a permanent injunction barring enforcement of both the VVGL and SEVGL.<sup>211</sup>

On September 14, 2005, Michigan Governor Jennifer Granholm signed into law an act that would regulate the distribution of video games defined as sexually explicit or ultra-violent explicit video games to persons under the age of seventeen.<sup>212</sup> The law defines an "ultra-violent explicit video game" as one that "continually and repetitively depicts extreme and loathsome violence."<sup>213</sup> The law also defines "extreme and loathsome violence" as meaning "real or simulated graphic depictions of physical injuries or physical violence against parties who realistically appear to be human beings . . . ."<sup>214</sup>

A number of creators, publishers and video game distributors, as plaintiffs, brought suit in federal district court to enjoin the enforcement of the law.<sup>215</sup> In filing their complaint, the plaintiffs stated the law was invalid since it was in violation of the First and Fourteenth Amendments and, therefore, unconstitutional.<sup>216</sup> After being granted a temporary injunction, the plaintiffs moved for summary judgment on their claims, which the district court ultimately granted.<sup>217</sup>

In the first part of its analysis, the district court focused on the issue of whether video games were a protected form of expression under the First Amendment.<sup>218</sup> It determined that the original artwork, music, storylines, and

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context of the video game industry, the statute would leave retailers and game publishers guessing as to what types of games are considered violent for the purposes of the statute. *Id.* at 1077. Thus, the statute also fails for its unconstitutional vagueness. *Id.*

<sup>208</sup> *Id.* at 1081.

<sup>209</sup> "Commercial speech" is defined as disclosures that are "purely factual and uncontroversial" and "intended to dissipate the possibility of consumer confusion or deception." *Id.* at 1081 (quoting *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 651–52 (1985)). The appropriate level of review for such speech is the lower level rational basis test. *Id.*

<sup>210</sup> *Id.* at 1081–82.

<sup>211</sup> *Id.* The State of Illinois later appealed the district court's ruling, but only with respect to the SEVGL. See *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006). Accordingly, the State was ordered to pay the plaintiffs \$510,000 for attorney's fees. See *Essential Facts: About Video Games and Court Rulings*, *supra* note 123, at 7.

<sup>212</sup> *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 649 (E.D. Mich. 2006). See also 2005 Mich. Pub. Acts 108.

<sup>213</sup> 2005 Mich. Pub. Acts 108, part II.

<sup>214</sup> *Id.*

<sup>215</sup> *Granholm*, 426 F. Supp. 2d at 649.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 650.



characters in video games were not unlike those in movie and television shows, which are both protected by the First Amendment.<sup>219</sup> In addition, the district court rejected the defendants' argument that video games were a distinct category of media based on its interactive functionality.<sup>220</sup> The court reasoned that while video games are an ever expanding technology, with advancements that allow players to interact and control the fate of their characters more than ever before, "[i]t would be impossible to separate the functional aspects of a video game from the expressive, inasmuch as they are so closely intertwined and dependant on each other in creating the virtual experience."<sup>221</sup> As such, video games are considered to contain expressive free speech that is protected by the First Amendment.<sup>222</sup>

Next, the district court applied the strict scrutiny level of review to the law, since it was seeking to infringe First Amendment rights of free speech.<sup>223</sup> In doing so, it quickly dismissed the defendants' argument that the appropriate approach was that in *Ginsberg*, relying on the lack of precedent to support such an application.<sup>224</sup> In proceeding with its strict scrutiny review, the district court found that even if the law had satisfied the requirements in *Brandenburg*, "the State has failed to support its claims by 'substantial evidence.'"<sup>225</sup> The district court reviewed, somewhat in depth, the evidence presented by the defendants which included studies conducted by psychologists Dr. Craig Anderson and Dr. William Kronenberg.<sup>226</sup> Dr. Anderson's research was based on a "general aggression model"<sup>227</sup> that suggested playing violent video games creates "automatized" aggressive thoughts and behaviors.<sup>228</sup> The district court, however, was unconvinced by his studies finding they did not provide any "evidence that the relationship between violent video games and aggressive behavior exists."<sup>229</sup> Nor did they prove that "video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere."<sup>230</sup>

The district court was even less impressed with Dr. William Kronenberg's

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<sup>219</sup> *Id.* at 651.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 651–52. As previously discussed, strict scrutiny requires that the State prove the law advances a compelling state interest and that it is narrowly tailored to advance such interest. *Id.* Before getting to its analysis, the court briefly addressed the plaintiffs' argument that the law fails the three part test for radical speech outlined in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *Id.* at 652. It agreed that under the *Brandenburg* analysis, the law failed the first prong, which states that "free speech may be restricted if it 'is directed to inciting or producing the imminent lawless action and is likely to incite or produce action'" *Id.* (quoting *Brandenburg*, 395 U.S. at 447). As such, there was no need to analyze the two other prongs of the test, however, the district court continued to apply the standard strict scrutiny review later in its opinion. *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 652–53.

<sup>226</sup> *Id.* at 653.

<sup>227</sup> See Anderson, *supra* note 190, at 202–04.

<sup>228</sup> *Granholm*, 426 F. Supp. 2d at 653.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* (quoting *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 578–69 (7th Cir. 2001)).

work, which failed to not only “provide concrete evidence that there is a connection between violent media and aggressive behavior, [but] it also fail[ed] to distinguish between video games and other forms of media.”<sup>231</sup>

After finding the defendants’ evidence less than compelling to support their position, the district court further determined that the law does not advance the stated interest of the legislature.<sup>232</sup> The State’s claimed interest is in protecting the physical and psychological well-being of minors as well as preventing violent and antisocial behavior.<sup>233</sup> According to the district court, however, the law fails to achieve this end since it “fails to regulate other comparable forms of violent media from minors.”<sup>234</sup> The most adequate demonstration of this point is that the State cannot achieve its stated interest when the law prevents a minor from purchasing games such as *Resident Evil 4* or *Doom 3*, but still allows them to buy *Resident Evil* and *Doom* movies.<sup>235</sup>

The district court completed the last part of the strict scrutiny analysis by stating that the law is not the least restrictive alternative to achieve its interests.<sup>236</sup> Other reasonable alternatives proffered by the court included an advertising campaign to better educate parents about the rating systems currently in place by the ESRB and further educate parents about what to look for when purchasing games for their children.<sup>237</sup> As such, the district court ruled the proposed regulation of violent video games is unconstitutional since it failed to pass the strict scrutiny test required of such laws.<sup>238</sup>

The district court also determined that the proposed regulation was unconstitutionally vague by looking at the effect the law would most likely have on retailers and game designers.<sup>239</sup> It found that the definitions in the law would cause retailers to respond with self-censoring and limit access to certain titles for fear of severe civil and criminal liabilities.<sup>240</sup> Furthermore, video game designers would be careful to create games that were well beyond the reach of the law in order to avoid any risk of penalties.<sup>241</sup>

Only a few months after the *Granholm* decision came down, the governor of Louisiana signed an act into law for the purpose of prohibiting the distribution of

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<sup>231</sup> *Id.* The district court also dismissed the joint statement of the American Medical Association, the American Pediatric Association and the American Psychological Association, which stated that violent video games have a “negative impact” on minors. *Id.* at 653.

<sup>232</sup> *Id.* at 654.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 655.

<sup>239</sup> *Id.* In order to avoid vagueness, “[t]he Constitution requires that statutes be set forth with ‘sufficient definiteness that ordinary people can understand what conduct is prohibited.’” *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

<sup>240</sup> *Id.* at 656.

<sup>241</sup> *Id.* Based on its ruling, the district court judge ordered the State of Michigan to pay the plaintiffs \$182,000 in attorneys’ fees and costs for the resulting litigation. See *Essential Facts: About Video Games and Court Rulings*, *supra* note 123, at 6.

video games “that appeal to a minor’s morbid interest in violence.”<sup>242</sup> This immediately prompted both the ESA and the EMA to bring an action for a preliminary injunction in the district court of Louisiana.<sup>243</sup> The two associations alleged that the law violated both the First and Fourteenth Amendments and was, therefore, unconstitutional.<sup>244</sup>

The enacted statute criminalized the sale or rental of video games meeting a certain criteria to anyone under the age of eighteen.<sup>245</sup> These special criteria included games that depict “violence in a manner patently offensive to prevailing standards in the adult community with respect to what is suitable for minors.”<sup>246</sup> The penalties for violating this law includes a fine of no less than one hundred dollars or imprisonment for no more than one year.<sup>247</sup>

The district court began its analysis with the determination of whether video games are considered speech or conduct with respect to the First Amendment.<sup>248</sup> Relying on a series of previous district and circuit opinions,<sup>249</sup> the Louisiana Middle District Court found that video games are considered speech, based on their expressiveness.<sup>250</sup> It also added that the fact that such expression includes depictions of violence does not make it any less entitled to full constitutional protection.<sup>251</sup>

Finding that the violent video games were deserving of full constitutional protection, the district court stated the appropriate level of review was strict scrutiny.<sup>252</sup> Louisiana argued that the statute was enacted for two compelling state interests, which included preventing both “physical” and “psychological” harm to minors.<sup>253</sup> The district court summarized these interests generally as “curbing violent behavior.”<sup>254</sup> While the court acknowledged the importance of such an interest, it determined that regulation of constitutionally protected expression requires a satisfaction of the *Brandenburg* test.<sup>255</sup> “Under *Brandenburg*, the

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<sup>242</sup> *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 825 (M.D. La. 2006); *see also* LA. REV. STAT. ANN. § 91:14 (2008), *repealed by* 2008 La. Acts 220.

<sup>243</sup> *Foti*, 451 F. Supp. 2d at 825.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> LA. REV. STAT. ANN. § 91:14(A)(2) (2008), *repealed by* 2008 La. Acts 220.

<sup>247</sup> *See* LA. REV. STAT. ANN. § 91:14(C) (2008), *repealed by* 2008 La. Acts 220.

<sup>248</sup> *Foti*, 451 F. Supp. 2d at 829.

<sup>249</sup> *See generally* *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 650–51 (E.D. Mich. 2006); *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1184–85 (W.D. Wash. 2004); *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 572 (7th Cir. 2001).

<sup>250</sup> *Foti*, 451 F. Supp. 2d at 829–30.

<sup>251</sup> *Id.* The district court also followed precedent in finding that the interactive aspect of video games does not distinguish it from other media for the purposes of First Amendment protection. *Id.* at 830.

<sup>252</sup> *Id.* The district court broke down the strict scrutiny standard into three distinctive parts: “(1) articulate a compelling state interest; (2) prove that the Statute actually serves that interest and is ‘necessary’ to do so; and (3) show that the Statute is narrowly tailored and a material advancement of that interest.” *Id.* at 831.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

government must prove that the targeted expression, ‘is *directed* to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action.’”<sup>256</sup> Because the proposed regulation of violent video games was based on the Louisiana legislature’s mere prediction that playing such games would tend to “encourage undesired behavior,” the court found that the State failed to satisfy the *Brandenburg* requirements.<sup>257</sup>

The district court also agreed with the plaintiffs’ assertion that protecting minors from “psychological harm” is not a valid stated interest, as it “amounts to nothing more than ‘impermissible thought control.’”<sup>258</sup> The court drew on support from the Supreme Court for this determination noting that, “First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end.”<sup>259</sup> As such, the district court found the State’s proffered interest in preventing psychological harm was not compelling since a state “may not restrict video game expression merely because it dislikes the way that expression shapes an individual’s thoughts and attitudes.”<sup>260</sup> The court also dismissed the State’s presented scientific evidence as sparse, unreliable and ultimately inadequate to constitute the requisite “substantial evidence” for showing a compelling state interest under the strict scrutiny standard.<sup>261</sup>

In the second section of its strict scrutiny analysis, the court dismissed Louisiana’s arguments that the law was both narrowly tailored and the least restrictive alternative for protecting minors from harm.<sup>262</sup> The court explained that banning violent video games would only shield minors from a “tiny fraction” of violent media since minors would still be able to legally buy the movies or books based on those same banned video games.<sup>263</sup> Additionally, the court pointed out that there are less restrictive alternatives already available to achieve the State’s goals, such as educating people about the ESRB rating system and promoting the use and development of parental controls.<sup>264</sup> Based on these findings, the district court ruled that the video game developers had proven there was a likelihood of success on their constitutional claims.<sup>265</sup>

The district court also discussed the unconstitutional vagueness of the statute declaring that even if the statute is “aimed at protecting minors, it still must be

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<sup>256</sup> *Id.* (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)) (emphasis added).

<sup>257</sup> *See id.* Specifically, the court stated that “the government may not punish speakers based solely on a prediction of suspicion that their words will tend, in the aggregate, to encourage undesired behaviors.” *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002)).

<sup>260</sup> *Id.* at 832.

<sup>261</sup> *Id.* at 832–33. Furthermore, the court found that even if the State were allowed more time to gather evidence to support its supposed interest, it is unlikely that they “will be able to establish that any video games are directed towards inciting imminent lawless action or that they are likely to cause such an action.” *Id.*

<sup>262</sup> *Id.* at 833.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* The court noted such alternatives would allow each individual household to decide “which games their children can play.” *Id.*

<sup>265</sup> *Id.*

clearly drawn with standards that are reasonably precise.”<sup>266</sup> After reviewing the language of the statute, the court determined that the lack of definitions for key terms such as “minor’s morbid interest in violence” and “patently offensive to prevailing standards in the adult community” was detrimental.<sup>267</sup> The court also drew on precedent in other cases where similarly worded statutes were also struck down based on a finding of unconstitutional vagueness.<sup>268</sup>

Thus, the district court concluded that enforcement of the Louisiana statute would cause “irreparable harm” not only to the plaintiffs, but the public as well because it violated the First and Fourteenth Amendments.<sup>269</sup> Three months later, Judge Brady issued an order directly from the bench that the preliminary injunction against enforcement of the law be made permanent.<sup>270</sup> Judge Brady cited the reasons for his decision as those previously elaborated by the district court in its ruling on the preliminary injunction.<sup>271</sup>

More recently, the Eighth Circuit affirmed the district court’s grant of a permanent injunction against the enforcement of a Minnesota statute that sought to restrict the distribution of video games based on the ESRB rating.<sup>272</sup> On May 31, 2006, the Minnesota Restricted Video Games Act was signed into law prohibiting the sale or rental of a video game that had earned an ESRB rating of either AO or M.<sup>273</sup> Violations of the law would incur a penalty of no more than \$25.<sup>274</sup> In addition, the statute required that all video game retailers post a sign advising minors of the aforementioned statute.<sup>275</sup>

In response to the enacted legislation, the ESA and EMA brought suit in the federal district court seeking a permanent injunction, which was subsequently granted based on the finding that the violent video games in question were protected speech under the First Amendment.<sup>276</sup>

In a brief opinion, the Eighth Circuit affirmed the lower court’s determination that violent video games are protected free speech and as such can only be regulated if there is a finding that the statute serves a compelling state

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<sup>266</sup> *Id.* at 835.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 835–36; *see also* Entm’t Software Ass’n v. Granholm, 427 F. Supp. 2d, 646, 655–56 (E.D. Mich. 2006) (finding the “lack of precision” in the statute’s definitions to be unconstitutionally vague); Video Software Dealers Ass’n v. Webster, 968 F.2d 684, 690 (8th Cir. 1992) (finding the lack of “narrowly drawn, reasonable and definite standard[s]” in a statute prohibiting the sale and rental of violent video games to minors unconstitutionally vague).

<sup>269</sup> *Foti*, 451 F. Supp. 2d at 836–37. A showing of “irreparable harm” is a prerequisite to the granting of a preliminary injunction. *See* *Plummer v. Am. Institute of Certified Pub. Accountants*, 97 F.3d 220, 229 (7th Cir. 1996). As a result, the court ordered the state of Louisiana to pay the plaintiff video game associations \$91,000 for attorneys fees. *See Essential Facts: About Video Games and Court Rulings*, *supra* note 123, at 4.

<sup>270</sup> *See Essential Facts: About Video Games and Court Rulings*, *supra* note 123, at 3.

<sup>271</sup> *See id.*

<sup>272</sup> Entm’t Software Ass’n v. Swanson, 519 F.3d 768, 769 (8th Cir. 2008).

<sup>273</sup> *Id.*; *see* MINN. STAT. § 325I.06(1)-(2) (2006). *See also supra*, note 53 (explaining the ESRB ratings).

<sup>274</sup> MINN. STAT. § 325I.06(2) (2006).

<sup>275</sup> MINN. STAT. § 325I.06(3) (2006).

<sup>276</sup> *Swanson*, 519 F.3d at 770.

interest and is narrowly tailored to achieve that end.<sup>277</sup> Minnesota offered two compelling interests: (1) protecting the psychological well-being of minors and (2) protecting the “moral and ethical development of minors.”<sup>278</sup> The circuit court agreed that the appointed interests are compelling, much like previous courts; however, it distinguished itself from prior courts by saying it was not as “dismissive” in its finding that there was a lack of statistical certainty in establishing “a causal link between exposure to violent video games and subsequent behavior.”<sup>279</sup>

Although the court took a more lenient view of Minnesota’s empirical evidence, it did compare the violence in video games to violence depicted in great literature, such as the Bible.<sup>280</sup> The court found that even though it might be “risible to compare the violence depicted in the examples offered by the State to that described in classical literature, such violence has been deemed by our court worthy of First Amendment protection, and there the matter stands.”<sup>281</sup> As such, the court relied on *Interactive Digital Software Ass’n* to affirm the district court’s findings regarding the State’s failure to meet its burden of proof.<sup>282</sup>

As previously observed, every statute that has attempted to regulate the distribution of video games based on their violent content has been struck down as unconstitutional across all the circuits and districts. Most courts have expressly recognized video games as a protected form of expression under the First Amendment and, additionally, that the *Ginsberg* standard does not create an entirely new category of speech unprotected as to minors.

#### V. FACTS AND PROCEDURAL HISTORY OF THE NINTH CIRCUIT OPINION

As previously stated in Part II, section c, Governor Arnold Schwarzenegger signed into law California Civil Code §§1746-1746.5 (the “Act”) on October 7, 2005, effectively imposing a civil penalty on all persons who sell or rent violent video games to minors.<sup>283</sup>

Section 1746 of the California Civil Code defined the meaning of the terms “minor,”<sup>284</sup> “person,”<sup>285</sup> “video game,”<sup>286</sup> and most importantly, “violent video

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<sup>277</sup> *Id.* This standard is the strict scrutiny test. *Id.*

<sup>278</sup> *Id.* at 771.

<sup>279</sup> *Id.* at 772.

<sup>280</sup> *Id.* Specifically the court referenced a passage from *Judges* 4:21 in which “Heber’s wife [] picked up a tent peg and a hammer and went quietly to [Sisera] while he lay fast asleep, exhausted. She drove the peg through his temple into the ground and he died.” *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* Based on this determination, the Eighth Circuit refrained from discussing the other issues brought by the State on appeal including the over and under-inclusiveness of the statute. *Id.* at 771. The Attorney General later requested an *en banc* review of the appellate decision, however, this request was subsequently denied. See *Essential Facts: About Video Games and Court Rulings*, *supra* note 123, at 5. Accordingly, the state of Minnesota paid the plaintiffs \$65,000 for attorney’s fees and expenses. *Id.*

<sup>283</sup> See Assemb. B. 1179, ch. 638 (Cal. 2005); Robert H. Wood, *Violent Video Games: More Ink Spilled Than Blood – An Analysis of the 9th Circuit Decision in Video Software Dealers Association v. Schwarzenegger*, 10 TEX. REV. ENT. & SPORTS L. 103, 105 (2009).

<sup>284</sup> Under the statute, a “minor” is “any natural person who is under 18 years of age.” CAL. CIV. CODE § 1746(a) (West 2011).

game.”<sup>287</sup> Specifically, the statute under §1746(d)(1) defined a violent video game as one “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being.”<sup>288</sup> Furthermore, if a game meets these criteria, then it must meet one of two standards. The first standard has three requirements: that “[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors”; that the game “is patently offensive to prevailing standards in the community as to what is suitable for minors”; and that such actions “cause[] the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.”<sup>289</sup> The second standard requires that the video game “[e]nable[] the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse.”<sup>290</sup>

This regulation of video game sales prompted quick action from the VSDA and the ESA to file for a preliminary injunction in the United States District Court for the Northern District of California to stop the law from going into effect.<sup>291</sup> The plaintiffs argued that they were entitled to declaratory relief against the Act based on the fact that it violated the First and Fourteenth Amendments.<sup>292</sup> According to the plaintiffs, the unconstitutionality of the Act was rooted in its restriction of the freedom of expression as a presumptively invalid content-based regulation.<sup>293</sup> Both sides then proceeded to file cross-motions for summary judgment, but the district court ultimately ruled in favor of VSDA and ESA making the injunction permanent.<sup>294</sup> The district court’s ruling effectively invalidated the Act based on the finding that the Act failed to pass the test of strict scrutiny, which is the appropriate level of review for regulations of free speech.<sup>295</sup>

The State of California filed a timely appeal to the Ninth Circuit to reverse the district court’s grant of plaintiff’s summary judgment motion. The main issue on appeal was whether California’s statute was subject to the standard of strict scrutiny or, as the petitioners argued, was subject to the “variable obscenity”

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<sup>285</sup> Under the statute, a “person” is “any natural person, partnership, firm, association, corporation, limited liability company, or other legal entity.” CAL. CIV. CODE § 1746(b) (West 2011).

<sup>286</sup> “Video game” is defined as “any electronic amusement device that utilizes a computer, microprocessor, or similar electronic circuitry and its own monitor, or is designed to be used with a television set or a computer monitor, that interacts with the user of the device.” CAL. CIV. CODE § 1746(c) (West 2011).

<sup>287</sup> Katherine A. Fallow, *Content Legislation and Resulting Litigation – Schwarzenegger v EMA* 1023, PRACTICING LAW INST. 357, 361 (2010).

<sup>288</sup> CAL. CIV. CODE § 1746(d)(1) (West 2011).

<sup>289</sup> CAL. CIV. CODE § 1746(d)(1)(A) (West 2011). These three requirements are based on the *Miller* test for obscenity. See *supra* note 88, at 12. See *supra* Part III regarding the *Miller* standard.

<sup>290</sup> CAL. CIV. CODE § 1746(d)(1)(B) (West 2011).

<sup>291</sup> Video Software Dealers Ass’n v. Schwarzenegger, 2007 WL 2261546 (N.D. Cal. Aug. 6, 2007). The VSDA and the ESA are companies that “create, publish, distribute, sell and/or rent video games.” Video Software Dealers Ass’n v. Schwarzenegger, 556 F.3d, 950, 952 n.1 (9th Cir. 2009).

<sup>292</sup> *Schwarzenegger*, 556 F.3d at 953, 955.

<sup>293</sup> *Id.* at 955.

<sup>294</sup> Wood, *supra* note 283, at 105.

<sup>295</sup> *Schwarzenegger*, 556 F.3d at 955–56.

approach established in *Ginsberg*.<sup>296</sup> The second issue was whether the statute's requirement of labeling every "violent video game" with a solid white "18" outlined in black constituted compelled speech under First Amendment jurisprudence.<sup>297</sup>

With respect to the first issue, the Ninth Circuit reviewed the case of *Ginsberg* in order to determine the appropriate level of review for analyzing the constitutionality of California's statute.<sup>298</sup> As previously discussed in the section on the obscenity standard, the Supreme Court in *Ginsberg* held that the state could specifically prohibit the sale of pornographic materials to minors based on the finding that such materials were obscene and, therefore, not protected by the freedom of speech under the First Amendment. According to the Court, while the sexually-explicit materials in question were protected for distribution to adults that did not necessarily mean that such materials were constitutionally protected from regulation with respect to minors.<sup>299</sup> As such, the Court reasoned that the "concept of obscenity . . . may vary according to the group to whom the questionable material is directed or from whom it is quarantined."<sup>300</sup> By applying this special application of the obscenity standard to minors, the Court effectively rendered such obscene material as undeserving of First Amendment protection, and therefore the appropriate standard of review was the lower threshold of analysis known as the rational basis test.<sup>301</sup>

In applying the rational basis test, the *Ginsberg* Court offered two valid state interests to justify its regulation of obscene materials to minors: "(1) that 'constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society'; and (2) the state's 'independent interest in the well-being of its youth.'"<sup>302</sup>

The State of California argued that these two justifications for allowing regulation of obscene content to minors in *Ginsberg* should be equally applicable to the regulation of violent content to minors.<sup>303</sup> The Ninth Circuit, however, disagreed relying on the established jurisprudence of obscenity, "which relates to non-protected sex-based expression-not violent content."<sup>304</sup> The circuit court reasoned that when the Supreme Court in *Ginsberg* allowed the State of New York to regulate obscenity as to minors, it created a sub-category of obscenity that was not protected by the First Amendment as opposed to "an entirely new category of

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<sup>296</sup> Wood, *supra* note 283, at 105.

<sup>297</sup> *Id.*; *Schwarzenegger*, 556 F.3d at 954.

<sup>298</sup> *Schwarzenegger*, 556 F.3d at 959.

<sup>299</sup> *Ginsberg v. New York*, 390 U.S. 629, 636 (1968).

<sup>300</sup> *Id.*

<sup>301</sup> *Schwarzenegger*, 556 F.3d at 959 (quoting the Court in *Ginsberg* as reasoning that "to sustain the power to exclude material defined as obscenity by [the statute] only requires that we be able to say that is was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."). *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*



expression excepted from First Amendment protection.”<sup>305</sup> Thus, it determined that the *Ginsberg* “variable obscenity” approach was inapplicable to the present California statute regulating violent video game content to minors.

The Ninth Circuit also noted the Supreme Court’s careful limitation of obscenity to sexual material in the past.<sup>306</sup> This included the Supreme Court’s decisions in *Roth* and *Miller*, which expressly confined the meaning of obscenity to sex-based material.<sup>307</sup> Additionally, the Ninth Circuit reviewed the opinions from other circuits including *Kendrick*, in which the Seventh Circuit upheld the distinction between obscenity and violence.<sup>308</sup> The Ninth Circuit also pointed to decisions in the Second, Sixth, and Eighth Circuits, where the circuit courts declined the opportunity to extend the obscenity standard to violent content.<sup>309</sup> In addition, the circuit court returned to the *Ginsberg* holding pointing to the Supreme Court’s own limitation of its ruling:

We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State. It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York . . . to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see.<sup>310</sup>

Thus, the Ninth Circuit viewed *Ginsberg* to apply only in the context where the state intends to regulate the availability of sexually based material to minors, not violent material.<sup>311</sup> Accordingly, the Ninth Circuit declined the State’s invitation to expand the *Ginsberg* application to violent content and held that strict scrutiny remains the applicable standard of review.<sup>312</sup>

Under the strict scrutiny standard,<sup>313</sup> the California legislature advanced two compelling state interests: “(1) ‘preventing violent aggressive and antisocial behavior;’ and (2) ‘preventing psychological or neurological harm to minors who play violent video games.’”<sup>314</sup> However, California clarified its interest as protecting the “physical and psychological well-being of the children,” as opposed

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<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 959–60. *See also supra*, Part III.

<sup>308</sup> *Schwarzenegger*, 556 F.3d at 960.

<sup>309</sup> *Id.*; *see James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002) (holding that the obscenity jurisprudence did not extend to violent material); *Eclipse Enters, Inc. v. Gulotta*, 134 F.3d 63, 66–68 (2d Cir. 1997) (declining to put violent material “allegedly harmful to minors in the category of unprotected obscenity.”); *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992) (holding that videos “that contain [] violence but not depictions or descriptions of sexual conduct cannot be obscene.”).

<sup>310</sup> *Schwarzenegger*, 556 F.3d at 960 (quoting *Ginsberg v. New York*, 390 U.S. 629, 636–37 (1968)).

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 960–61.

<sup>313</sup> The court articulated the strict scrutiny standard, which requires that the Act be narrowly tailored to promote a compelling governmental interest and that the Act is the least restrictive alternative. *See id.* at 960.

<sup>314</sup> *Id.* at 961 (quoting the California legislature).

to protecting third parties from violent behavior.<sup>315</sup>

Just as previous courts had recognized this interest as compelling, the Ninth Circuit also found the stated interest in protecting the physical and psychological well-being of children as an acceptable compelling interest.<sup>316</sup> Despite the recognition that such an interest is compelling, the State must also “demonstrate that the recited harms are real, not merely conjectural.”<sup>317</sup> Before analyzing the State’s interest, the Ninth Circuit clarified that California’s asserted interest in protecting children from actual harm to their psychological health is separate and distinct from the State’s interest in controlling minor’s thought.<sup>318</sup> “The latter is not legitimate.”<sup>319</sup> As such, the State must show it has drawn “reasonable inferences” from the evidence presented that there is an actual harm to protect against.<sup>320</sup>

With this standard in mind, the Ninth Circuit reviewed the State’s evidence, which was heavily concentrated on the work of Dr. Craig Anderson.<sup>321</sup> Despite Dr. Anderson’s claims that exposure to violent video games is linked to increases in aggressive behavior, he admitted the shortcomings in the size of his study groups and “‘glaring empirical gap’ in video game violence research,” that undermined his assertions.<sup>322</sup> Furthermore, the Ninth Circuit noted the past circuit and district courts that repeatedly dismissed Dr. Anderson’s research as insufficient and/or inadequate.<sup>323</sup> The second study relied on by the State was conducted by Dr. Douglas Gentile, who concluded that eighth and ninth graders who were exposed to violent video games were more hostile, which affected their performance socially and academically in school.<sup>324</sup> However, the Ninth Circuit found this evidence also lacked substantiality because of the admitted “correlational nature” of the data gathered as well as the express disclaimers given in the study against drawing any causal conclusions.<sup>325</sup>

The circuit court also reviewed two supplemental studies cited by the State in support of its asserted compelling interest, but these studies failed for the same reasons as Dr. Anderson and Dr. Gentile’s studies.<sup>326</sup> Thus, based on these findings, the Ninth Circuit determined the State failed to meet its burden that there

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<sup>315</sup> *Id.* at 961. This interest is primarily focused on the “actual harm to the brain of the child playing the video game.” *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 962 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 662, 664 (1994)).

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 963.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*; see *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 578 (7th Cir. 2001) 578; *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 653 (E.D. Mich. 2006); *Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051, 1055, 1063 (N.D. Ill. 2005).

<sup>324</sup> *Schwarzenegger*, 556 F.3d at 963–64; see generally Douglas A. Gentile et al., *The effects of violent video game habits on adolescent hostility, aggressive behaviors, and school performance*, 27 J. ADOLESCENCE 5 (2005).

<sup>325</sup> *Schwarzenegger*, 556 F.3d at 964.

<sup>326</sup> *Id.*

is a legitimate and compelling interest in protecting the psychological health of children since it could not provide substantial evidence to show that there is a causal relationship between exposure to violent video games and actual, physical harm to the brain.<sup>327</sup>

The Ninth Circuit did not stop its analysis there. It concluded that even if the State had proven that there is a compelling interest in preventing psychological harm to children, it cannot show that the proposed law is narrowly tailored to further that interest, nor can it demonstrate that the law is the least restrictive alternative.<sup>328</sup> In making this determination, the circuit court cited the State's misplaced focus on the "'most effective' means" of achieving its declared interest, as opposed to focusing on the "least restrictive means."<sup>329</sup> This misguided emphasis included the State's argument that the ESRB ratings posted on video games are ineffective and that parental control technologies fail to appropriately address the State's concerns.<sup>330</sup> Additionally, the Ninth Circuit pointed out the existence of less restrictive alternatives dismissed by the State including improved education campaigns regarding the ESRB ratings directed at both parents and retailers.<sup>331</sup> As such, the Ninth Circuit determined that California's proposed law failed the strict scrutiny analysis rendering the law presumptively invalid.<sup>332</sup>

The Ninth Circuit also addressed whether the statute's labeling provision, which required all "violent video games" be labeled with a four square inch sticker stating "18," was constitutional.<sup>333</sup> The video game publishers argued that such a requirement is unconstitutionally compelled speech, since it conveys a message with which the plaintiffs do not agree.<sup>334</sup> Before beginning its analysis, the court stated the relevant law that "freedom of speech prohibits the government from telling people what they must say."<sup>335</sup> However, there is an exception to this rule when the government attempts to prohibit "commercial speech," which is used in advertisements and defined as "purely factual and uncontroversial information."<sup>336</sup>

The Ninth Circuit determined that the constitutionality of the labeling requirement was dependent on the court's prior determination that the law's prohibition on the distribution of violent video games to minors is unconstitutional.<sup>337</sup> It reasoned that, "[u]nless the Act can clearly and legally characterize a video game as 'violent' and not subject to First Amendment

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<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 964–65.

<sup>329</sup> *Id.* at 965.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 966 (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006)).

<sup>336</sup> *Id.* (quoting *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985)).

<sup>337</sup> *Id.* at 966–67.

protections, the ‘18’ sticker does not convey factual information.”<sup>338</sup> Additionally, “the State’s mandated label would . . . convey a false statement that certain conduct is illegal when it is not,” and, therefore, the State cannot require retailers to display false information on their products.<sup>339</sup> Thus, the labeling requirement was ruled unconstitutional.<sup>340</sup>

In its conclusion, the Ninth Circuit summarized its findings and repeated its disinclination to apply *Ginsberg*’s “variable obscenity standard” to the California statute.<sup>341</sup> Thus, it affirmed the district court’s grant of summary judgment for the plaintiffs based on the conclusion that the California statute was unconstitutional in all respects.<sup>342</sup> Accordingly, California reimbursed the EMA for costs incurred because of the appeal in the amount of \$282,794.<sup>343</sup>

Despite defeat in both the district and circuit courts, California successfully appealed the case to the Supreme Court of the United States on grant of certiorari.<sup>344</sup> To date, state and local taxpayers have paid the video game industry an estimated \$2,158,916 in attorney’s fees and expenses as the result of the lawsuits generated by failed legislation.

## VI. THE SUPREME COURT DECISION

On June 27, 2011, the Supreme Court issued its opinion on the constitutionality of California’s violent video game ban in *Brown v. Entertainment Merchants Ass’n*. In its 7-2 decision, the Supreme Court made three major holdings: (1) video games are deserving of First Amendment protection; (2) while there are limited exceptions to the prohibition against content-based governmental restrictions on expressions such as obscenity, incitement, and fighting words, new categories of unprotected speech may not be added; and (3) California failed to satisfy the burden of showing either that the law was justified by a compelling government interest, or that the law was narrowly drawn to serve that interest.<sup>345</sup>

Justice Antonin Scalia<sup>346</sup> wrote the opinion in which the Supreme Court expressed its view on violence in the media and the government’s role in protecting minors from certain media content. After briefly summarizing the procedural history of the case, the Court explicitly affirmed the well-accepted

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<sup>338</sup> *Id.* at 967.

<sup>339</sup> *Id.*

<sup>340</sup> *See id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *Brown v. EMA*, MEDIA COALITION, <http://mediacoalition.org/VSDA-v.-Schwarzenegger> (last visited Nov. 14, 2011).

<sup>344</sup> *See Boyd*, *supra* note 8, at 1–3.

<sup>345</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2729 (2011). Justices Scalia, Kennedy, Ginsburg, Sotomayor and Kagan joined in the majority opinion, while Justices Alito and Roberts concurred. Justices Thomas and Breyer filed separate dissenting opinions.

<sup>346</sup> Justice Scalia made his view on the California legislation clear during oral arguments, on November 2, 2010. During that time, he asked: “What’s next after violence? Drinking? Smoking? Movies that show smoking can’t be shown to children?” *See* Transcript of Oral Argument at 16, *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950 (2009) (No. 08-1148).

principle that video games qualify for First Amendment protection.<sup>347</sup> The Court likened video games to other forms of entertainment, namely books, plays and movies.<sup>348</sup> Although video games are distinct because of the player's ability to interact within a virtual world, the Court reasoned that because video games communicate ideas and messages (just like books, movies, and plays), they are worthy of full First Amendment protection.<sup>349</sup> The Court's most notable evaluation, however, was its implication that future technologies will be subject to the same protections of the First Amendment.<sup>350</sup> Specifically, the Court stated that "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears."<sup>351</sup>

To support this reasoning, the Court referred to *Ashcroft v. American Civil Liberties Union*, which held that "as a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."<sup>352</sup> The Court, however, was quick to acknowledge that there are exceptions to this rule, specifically with respect to the areas of obscenity, incitement, and fighting words.<sup>353</sup>

The opinion next discussed its last term ruling from the case of *U.S. v. Stevens*, in which the Supreme Court struck down a statute criminalizing the creation, sale, or possession of *depictions* of animal cruelty.<sup>354</sup> Reiterating its previous holding, the Court explained that such restrictions on the depiction of animal cruelty were unconstitutional. However, laws forbidding the actual commission of such acts were permissible.<sup>355</sup> In *Stevens*, the government made a similar appeal to the Court, arguing that if the determined value of a particular category of speech was outweighed by the social costs, then that category of speech should be punishable.<sup>356</sup> The Court related how it objected to such a conclusion because "without persuasive evidence that a novel restriction on content is part of a long . . . tradition of proscription, a legislature may not revise the judgment of the American people . . ."<sup>357</sup> The Court determined that these same principles control in the case of restrictions on the distribution of video

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<sup>347</sup> *Brown*, 131 S. Ct. at 2733 (stating that "California correctly acknowledges that video games qualify for First Amendment protection."). While this qualification was already well accepted and established, the Supreme Court's own affirmation of this principle is historical because this is the first video game case to be heard by the United States Supreme Court.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.* It appears that the Court is trying to preempt future litigation that attempts to restrict emerging technologies because of its increased interactivity, such as the motion sensory technology of Xbox's Kinect and PlayStation's Move systems.

<sup>352</sup> *Id.* at 2733 (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)).

<sup>353</sup> *Id.* (citing to *Roth v. United States*, 354 U.S. 476 (1957), *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

<sup>354</sup> *U.S. v. Stevens*, 130 S. Ct. 1577, 1582–83 (2010).

<sup>355</sup> *Brown*, 131 S. Ct. at 2734.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* (quoting *Stevens*, 130 S. Ct. at 1588) (internal quotations omitted).

games.<sup>358</sup>

In light of this finding, the opinion next explained how California's regulation is just another attempt by the legislature to "shoehorn speech about violence into obscenity."<sup>359</sup> This discussion included the Court's comparison of the California's violent video game regulation to the New York law that prohibited the sale of certain sexual content to minors in *Ginsberg*.<sup>360</sup> The Supreme Court found it was of no consequence that California's statute mimicked the constitutional law in *Ginsberg*, since speech about violence is not obscene, and therefore cannot be treated as such.<sup>361</sup> The Court further distinguished the present case from *Ginsberg* by stating that the California law "does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children . . . . Instead, it wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children."<sup>362</sup> According to the Court, such a departure from the traditions of regulated speech is "unprecedented and mistaken."<sup>363</sup>

While the Court recognized that the State has a legitimate concern of protecting children from exposure to harmful media, this does not give California the limitless power to restrict the ideas and messages it believes are harmful to children.<sup>364</sup> The Court quoted its previous decision in *Erznozik v. Jacksonville*, for emphasis that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."<sup>365</sup> The Court then went on to explore the longstanding history of violence in children's media, most notably in children's books.<sup>366</sup> The depictions of violence in fairytales such as *Snow White* and classics such as *Homer's Odyssey* are just a few examples that illustrate the tradition of children's exposure to violent content.<sup>367</sup>

This led the Court to relate the history of action taken to restrict violent entertainment to minors.<sup>368</sup> The first "villain" was dime novels depicting crime, followed by motion pictures, radio dramas, and comic books.<sup>369</sup> After that came television and music.<sup>370</sup> And most recently, violent video games are the perceived threat to children.

At this point, the Court addressed California's argument that video games are distinguishable from other forms of media because they are interactive in that the

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<sup>358</sup> *Id.* (stating "[t]hat holding [in *Stevens*] controls this case").

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* at 2735.

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 2736 (quoting *Erznozik v. Jacksonville*, 422 U.S. 205, 212–13 (1975)).

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 2736.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.* at 2737.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 2737.

player participates in the violence and determines its outcome.<sup>371</sup> The Court, however, found this distinction unconvincing for two reasons.<sup>372</sup> First, with respect to controlling the outcome of the game, this is a common feature akin to “choose-your-own-adventure stories,” which have been around since 1969.<sup>373</sup> Second, as for the player’s participation, the Court viewed this as “more a matter of degree than kind.”<sup>374</sup> This increased interactivity, however, is not a strike against video games, and is in fact, a testament to their success at drawing the player into the experience.<sup>375</sup>

The Court also addressed the concern with the goriness and severity of the violence depicted in the video games.<sup>376</sup> While the Court acknowledged its disgust with the graphic depictions of dismemberment, decapitation, and disembowelment, “disgust is not a valid basis for restricting expression.”<sup>377</sup> Indeed, the Court observed that these images are so intense that it ignites the viewer’s desire to put an end to this violence, but therein lies the problem with California’s legislation: “that the *ideas* expressed by speech – whether it be violence, or gore, or racism – and not its objective effects, may be the real reason for government proscription.”<sup>378</sup> This is precisely the type of regulation that the First Amendment is designed to prevent.

After its analysis rendering video games fully protected by the First Amendment, the Court found that California’s statute could only survive constitutional challenge if it met the burden of the strict scrutiny test.<sup>379</sup> This required that California’s regulation on the distribution of violent video games to minors to be justified by a compelling government interest,<sup>380</sup> and that the law be narrowly tailored to serve that interest.<sup>381</sup> Putting this standard into context, California must specify an actual problem that needs solving, and show that restriction on free speech is necessary to that solution.<sup>382</sup>

Applying this high standard, the Court determined that California could not meet the first part of the test since it could not prove there is an actual problem in

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<sup>371</sup> *Id.* at 2737–38.

<sup>372</sup> *Id.* at 2738.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Id.* at 2738. The Court quotes Judge Posner, when he commented on the interactivity of literature by stating, “the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the readers’ own.” *Id.* (quoting *Am. Amusement Mach. Ass’n v. Kendrick*, 224 F.3d 572, 577 (7th 2001)).

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> *Id.* at 2738.

<sup>380</sup> In its oral argument, California stated that it has two compelling interests: (1) permitting parents to exercise authority in their own household and direct the upbringing and development of their children, and (2) helping parents protect the well-being of children when they cannot be present. *See* Transcript of Oral Argument at 3–4, *Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950 (2009), No. 08-1148.

<sup>381</sup> *Brown*, 131 S. Ct. at 2738.

<sup>382</sup> *Id.*

need of a solution.<sup>383</sup> In his opinion, Justice Scalia was quick to point out that California admits that “it cannot show a direct causal link between the violent video games and harm to minors.”<sup>384</sup> Furthermore, the Court found the State’s evidence was not compelling for several reasons. First, the State’s reliance on the research of Dr. Anderson and a handful of other psychologists was misplaced since “[t]hey do not prove that violent video games *cause* minors to *act* aggressively (which would at least be a beginning).”<sup>385</sup> Rather these studies indicate there is merely a correlation between children’s exposure to violent entertainment and “miniscule real-world effects, such as children’s feeling more aggressive or making louder noises in the few minutes after playing a violent video game than after playing a nonviolent game.”<sup>386</sup> Moreover, when presented with these studies, every court has rejected them.<sup>387</sup>

The Court’s opinion then pointed out that one of the most glaring problems in Dr. Anderson’s research is that the effects caused by violent video games are small and indistinguishable compared to the effects caused by other media. Most notably, Dr. Anderson admitted the effects on children who play violent video games are “the *same* effects [that] have been found when children watch cartoons starring Bugs Bunny or the Road Runner, or when they play video games like Sonic the Hedgehog that are rated ‘E’ or even when they view a picture of a gun.”<sup>388</sup> In light of the finding that California seeks to protect children from the harmful effects of violent media by restricting the sale of violent video games only, the Court concluded the California statute was wildly underinclusive.<sup>389</sup> The Court took issue with this result since it “raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”<sup>390</sup>

Additionally, the Court concluded that the California law is also underinclusive for the reason that the statute allows these allegedly “dangerous, mind-altering” games to find their way into the hands of minors so long as a parent or guardian gives them permission.<sup>391</sup> The opinion expressed the Court’s “doubts that punishing third parties for conveying protected speech to children *just in case* their parents disprove of that speech is a proper governmental means of aiding parental authority.”<sup>392</sup>

Furthermore, the Court found that the California law did not substantially assist parents who wish to restrict their child’s access to violent video games, but

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<sup>383</sup> *Id.*

<sup>384</sup> *Id.* The Court acknowledges the State’s argument that it does not need conclusive proof under the ruling in *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994). However, the Court finds this reasoning in error since the Court in *Turner Broadcasting System* was reviewing a content neutral regulation under intermediate scrutiny, unlike the present case. *Brown*, 131 S. Ct. at 2738–39.

<sup>385</sup> *Id.* at 2739.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Id.* (internal citations and quotations omitted).

<sup>389</sup> *See id.* at 2740.

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*



are unable to do so.<sup>393</sup> In his analysis of this conclusion, Scalia highlighted the fact that the video game industry already has a voluntary rating system in place that addresses parental concerns by identifying the content of the game.<sup>394</sup> Moreover, he noted that the VSDA encourages game distributors to exhibit information the ESRB rating system in their stores and to abide by the system by refusing to sell “M” rated titles to minors without parental consent.<sup>395</sup> Scalia also found the results of the FTC’s latest report on the marketing of violent media to children compelling.<sup>396</sup> The opinion recounted the FTC’s summary finding in which “the video game industry outpaces the movie and music industries” in the three areas of most concern: “(1) restricting target-marketing of mature-rated products to children; (2) clearly and prominently disclosing rating information; and (3) restricting children’s access to mature-rated products at retail.”<sup>397</sup> In light of the effectiveness of the video game industry’s self-regulation, the Court found that “[f]illing the remaining modest gap in concerned-parents’ control can hardly be a compelling state interest.”<sup>398</sup>

Aside from the law’s underinclusiveness, the Court found the law overinclusive as well with respect to the claim that such a law supplements parental authority.<sup>399</sup> Scalia’s opinion pointed out that the California regulation does not take into account the fact that some children who will be prohibited from purchasing video games under the law have parents who do not care whether their child is buying violent video games.<sup>400</sup> As a result, the law’s purported aim to assist parental authority actually supports only what “the State thinks parents *ought* to want.”<sup>401</sup> This overinclusiveness demonstrated that the California law was not narrowly tailored to serve its supposed compelling interest.<sup>402</sup>

Before giving his final thoughts, Scalia qualified the opinion by stating that “[w]hile we have pointed out above that some of the evidence brought forward to support the harmfulness of video games is unpersuasive, we do not mean to demean or disparage the concerns that underlie the attempt to regulate them . . . .”<sup>403</sup> The Supreme Court did not intend to pass judgment on California’s concern that violent video games may corrupt the minds of the young; however, the Court must respect the government confines when it comes to restricting constitutionally protected speech and expression.<sup>404</sup>

In closing, Scalia acknowledged that California’s presented interests in “(1)

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<sup>393</sup> *Id.*

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 2740–41; *see also supra*, Part II (b).

<sup>396</sup> *Brown*, 131 S. Ct. at 2741 (concluding “[t]his system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home.”).

<sup>397</sup> *Id.*; *see also FTC Follow-Up Report 2009, supra* note 40, at 30.

<sup>398</sup> *Brown*, 131 S.Ct. at 2741.

<sup>399</sup> *Id.*

<sup>400</sup> *Id.* at 2741.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

addressing a serious social problem and (2) helping concerned parents control their children,” were legitimate.<sup>405</sup> The law intended to incorporate these concerns, however, was fatally underinclusive and overinclusive.<sup>406</sup> As a result, “[l]egislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny,”<sup>407</sup> and therefore, the judgment of the Ninth Circuit was affirmed.<sup>408</sup>

Justice Alito and Chief Justice Roberts concurred in the final judgment; however, their concurrence articulated their disagreement with the Court’s treatment of video games as just another form of media, as opposed to an evolving new technology.<sup>409</sup> Specifically, the concurrence speculated that “[t]here are reasons to suspect that the experiences of playing video games just might be very different from reading a book, listening to the radio, or watching a movie or television show.”<sup>410</sup> The concurrence then proceeded to conduct a more in depth analysis of the comparison of California’s video game regulation to the statute at issue in *Ginsberg*.<sup>411</sup>

As an additional point of contention, the concurrence disagreed with the majority’s assessment that *Stevens* controls.<sup>412</sup> The concurrence distinguished the present law from that at issue in *Stevens* by observing that the statutes in *Stevens* prohibited *any person* from creating, selling, or possessing depictions of animal cruelty, while California’s law specifically prohibited the sale of violent video games to *minors*.<sup>413</sup> Second, the concurrence stated that *Stevens* does not support the majority’s application of the strict scrutiny standard to the California law. Lastly, Alito expressed his disapproval with the majority opinion’s sweeping decision, which was unlike that in *Stevens* where the Court left the door open for a later, more narrowly tailored statute to be found constitutional.<sup>414</sup> Alito’s concurrence expressed the concern that the majority decision will be interpreted as indicating that no regulation of a minor’s access to violent video games is ever allowed.<sup>415</sup> As such, Alito believed that a properly drafted statute framed within constitutional requirements may be permitted and thus, the majority failed to leave room for this possibility.<sup>416</sup>

As for the dissent, Justice Thomas and Justice Breyer authored their own separate opinions. Justice Thomas’ dissent took the view that the majority improperly extended the protections of the First Amendment.<sup>417</sup> Instead, Justice Thomas believed the present case encompasses a new category of speech: “speech

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<sup>405</sup> *Id.* at 2741–42.

<sup>406</sup> *Id.* at 2742.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

<sup>410</sup> *Id.* (Alito, J., concurring).

<sup>411</sup> *Id.* at 2743–45.

<sup>412</sup> *Id.* at 2747.

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> *Id.* at 2750.

<sup>417</sup> *Id.* at 2751 (Thomas, J., dissenting).

to minor children bypassing their parents.”<sup>418</sup> Thomas then went on to relate the history of parents having authority over what their children are exposed to.<sup>419</sup> Based on Thomas’s historical analysis in which parents exhibited complete authority over their children, he concluded that “the Framers could not possibly have understood ‘the freedom of speech’ to include an unqualified right to speak to minors.”<sup>420</sup> Accordingly, a law abridging speech that addresses minors without parental consent does not violate the First Amendment.<sup>421</sup> In conclusion, Justice Thomas reasoned that:

Where a minor has a parent or guardian . . . the law does not prevent that minor from obtaining a violent video game with his parent’s or guardian’s help. In the typical case, the only speech affected is speech that bypasses a minor’s parent or guardian. Because such speech does not fall within the “freedom of speech” as originally understood, California’s law does not ordinarily implicate the First Amendment and is not facially unconstitutional.<sup>422</sup>

Conversely, Justice Breyer believed the California law was constitutional and comported with the First Amendment.<sup>423</sup> Firstly, Breyer stated that the applicable standards of review in determining the constitutionality of California’s video game regulation are the vagueness precedents and the strict scrutiny test.<sup>424</sup> The relevant category of speech for this type of review, however, is not depictions of violence, but rather is the category of “protection of children.”<sup>425</sup>

Under the vagueness analysis, Breyer found the California statute provided sufficient notice of what is prohibited under the law, and therefore was not impermissibly vague.<sup>426</sup> Additionally, California’s law was no more vague than New York’s statute in *Ginsberg*.<sup>427</sup> Accordingly, any issues of remaining confusion could be cured through the state courts’ interpretation.<sup>428</sup>

Breyer then proceeded to apply the standard of strict scrutiny to California’s video game regulation, but with the opposite result from the majority.<sup>429</sup> To arrive at this result, Breyer determined that both California’s interest in addressing a social problem and in aiding parental authority are legitimate, and indeed, are furthered by the California legislation.<sup>430</sup> According to Breyer, the California law achieved these aims since it only prevents a minor from buying a violent video

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<sup>418</sup> *Id.* at 2752.

<sup>419</sup> *Id.* Justice Thomas begins this analysis with the Puritan tradition, leading to a discussion of Locke and Rousseau’s theories on children’s psychology. *Id.* at 2752–53.

<sup>420</sup> *Id.* at 2759.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.* at 2761.

<sup>423</sup> *Id.* (Breyer, J., dissenting).

<sup>424</sup> *Id.* at 2762.

<sup>425</sup> *Id.*

<sup>426</sup> *Id.* at 2763.

<sup>427</sup> *Id.* at 2763–65.

<sup>428</sup> *Id.* at 2765.

<sup>429</sup> *Id.* at 2765–66.

<sup>430</sup> *Id.* at 2766–67.

game without a parent's permission.<sup>431</sup> Furthermore, video games are accepted teaching tools, and therefore, properly regulating the distribution of video games deemed exceedingly violent will further California's aim of protecting the physical and psychological well-being of minors.<sup>432</sup> Breyer admittedly found the scientific studies and reports presented by the State in its argument compelling, unlike the majority, in this respect.<sup>433</sup>

Because Breyer concluded that the California law passes the first part of the strict scrutiny test, he continued his analysis with the application of the second part of the test, which is whether there were any less restrictive means that would accomplish California's objectives.<sup>434</sup> In his brief analysis on this second part of the test, Breyer made the cursory finding that the video game industry's self-implemented regulations have failed to achieve the goal of ensuring that minors do not have access to mature-rated video games, and therefore, there are no less restrictive alternatives.<sup>435</sup>

In conclusion, Breyer posited that the majority's decision creates an anomaly in First Amendment law.<sup>436</sup> Specifically, Breyer cannot reconcile the majority's ruling in light of the *Ginsberg* holding, which begs the question, "what sense does it make to forbid selling a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her?"<sup>437</sup>

Breyer concluded his dissent with the opinion that *Ginsberg* controls the outcome of the case and therefore, California's violent video game regulation was constitutional on its face.<sup>438</sup> Moreover, Breyer imparted that the present case is more about education than censorship.<sup>439</sup> As such, the First Amendment does not prevent the government from assisting parents with their children's education about matters of violence.<sup>440</sup>

## VII. POTENTIAL IMPACT ON VIDEO GAME INDUSTRY

Although the Supreme Court has affirmed that California's regulation on the distribution of violent video games is unconstitutional, it is still productive to explore the potential impact a constitutional regulation would have on the business of the video game industry.

While it is difficult to predict the effects of enforcing such a violent video game regulation without being flooded by dramatic claims that the video game

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<sup>431</sup> *Id.* at 2766.

<sup>432</sup> *Id.* at 2767.

<sup>433</sup> *Id.* at 2767–70.

<sup>434</sup> *Id.* at 2770.

<sup>435</sup> *Id.*

<sup>436</sup> *Id.* at 2771.

<sup>437</sup> *Id.*

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> *Id.*

industry would fade into obscurity, there is some truth to the negative impact video game regulation would have on the industry and the economy. If a statute similar to California's law were put into effect, retailers and video game developers would be liable for fines of up to \$1,000 for each violation.<sup>441</sup> Additionally, the law provides guidelines for reporting suspected violations to the city or district attorney, giving overly protective parents more than enough ammo to bring retailers under fire who sell video games that remotely portray some form of "violence."<sup>442</sup> Thus, there is little exaggeration to the conclusion that the creation of M-rated games would decrease substantially since retailers would not want to risk the liability of selling such games illegally to minors. This unwillingness to distribute such M-rated games would create a domino effect reaching not only game publishers, who will not produce games that could not be sold, but also developers, who actually design and create video games. Although, the majority of the video game industry's revenue comes from the sale of E-rated games,<sup>443</sup> half of the top-selling games for 2010 were M-rated games.<sup>444</sup> Thus, a regulation imposing penalties for distributing such games to minors would inevitably drive video game developers away from producing games that could incur a fine.<sup>445</sup>

Additionally, legal minded experts predict that original titles, i.e. games owned by publishers with established franchises including *Call of Duty* and *Grand Theft Auto*, would be affected first.<sup>446</sup> This would take place in the form of modifying existing original titles in order to avoid the risk for penalties and to avoid publishing an "unproven commodity" that could be deemed too violent.<sup>447</sup> In addition, the brunt of the risk will be put on smaller, independent developers since they produce and publish their own games.<sup>448</sup> Thus, if a title does not procure revenue, the independent developers will be not be able to afford the costs of creating their next project. As publishers shift the pressure from the retailers to developers to create statutorily acceptable games, it is unlikely independent developers will survive when it is uncertain whether their titles will be distributed, drastically affecting sales.<sup>449</sup> Thus, it is likely more development projects will move away from independent studios who cannot afford to take risks with creating a game that may fail to be published.<sup>450</sup>

In light of the uncertainty with which such legislation would be applied, production of games would most likely take longer to reach completion in order

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<sup>441</sup> See CAL. CIV. CODE § 1746.3 (West 2011).

<sup>442</sup> See CAL. CIV. CODE § 1746.4 (West 2011).

<sup>443</sup> See Reeves, *supra* note 57, at 23.

<sup>444</sup> See Reilly, *supra* note 61.

<sup>445</sup> See Patrick Sweeny, *The Slippery Slope: Practical Implications if California Assembly Bill No. 1179 is ruled constitutional*, REEDSMITH (Sept. 22, 2010), <http://www.developingconcerns.com/2010/09/articles/game-industry/the-slippery-slope-practical-implications-if-california-assembly-bill-no-1179-is-ruled-constitutional/>.

<sup>446</sup> *Id.*

<sup>447</sup> *Id.*

<sup>448</sup> As opposed to other developers that are paid up front by the publishing company and, therefore, receive payment on a title regardless of how it sells.

<sup>449</sup> *Id.*

<sup>450</sup> See *id.*

for developers to carefully traverse the murky waters of what constitutes a regulated violent video game. Or, games will continue to be produced on time; however, the detail and precision with which games are normally produced will decline out of an abundance of caution by developers, resulting in generic and unoriginal video game content. Thus, content and creativity alike would suffer.

There is genuine concern among video game consumers, dubbed “gamers,” that any regulation on the sale of video games will affect the games they’ve come to know and love. Prior to the Supreme Court’s decision, Ronald Williams, an avid gamer who has been playing video games since he was three-years-old, voiced his concern that “if [the law] were to pass, it would severely limit what developers produce and make, on top of a lot of revenue being lost.”<sup>451</sup> Williams expressed his fear that “the future game experience will change,” and that there will be a “[s]carlet letter on any [game] above a Teen [ESRB] rating.”<sup>452</sup> Moreover, Williams stated, “this isn’t the end of the regulation of video game content,” a topic which he feels strongly about.<sup>453</sup> As a consumer, Williams feels he’s virtually powerless to stop the state from generating legislation that threatens to erode his favorite hobby.<sup>454</sup>

The courts have also recognized this “chilling effect” on creativity. In *Blagojevich*, the district court quoted Ted Price, the President and CEO of Insomniac Games, as saying that, “creators will be unable to determine what is regulated, forcing them to eliminate anything in their games that resembles violence.”<sup>455</sup> As an example Price expressed his would-be reluctance to include even cartoon violence in his games.<sup>456</sup> Furthermore, courts have recognized that laws regulating the distribution of violent video games will place the burden on retailers, who “would likely steer clear of any game with the potential of such violence in order to avoid civil and criminal liability, thus denying constitutionally protected free speech to minors and adults.”<sup>457</sup>

With severe limitations in place, it is likely that consumers, publishers, and developers will turn to the Internet for “hard-core” games, as least initially.<sup>458</sup> The access to downloadable content, however, will only be uninhibited for so long, as legislation similar to that regulating retail sales will be drafted for distribution of downloadable content.<sup>459</sup> If such legislation were enacted to regulate the internet,

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<sup>451</sup> Interview with Ronald Williams, a 26-year-old gamer, in Los Angeles, California (Feb. 23, 2011). Mr. Williams subscribes to two video game magazines, *Gameinformer* and the *Official Play Station Magazine*, and listens to over ten different video game podcasts per week in addition to his daily browsing of accredited video games websites including *IGN.com* and *GiantBomb.com*.

<sup>452</sup> *Id.*

<sup>453</sup> *Id.*

<sup>454</sup> *Id.* Specifically, Mr. Williams states, “there’s [sic] only so many petitions you can sign.” *Id.*

<sup>455</sup> *Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051, 1055, 1070 (N.D. Ill. 2005).

<sup>456</sup> *Id.*

<sup>457</sup> *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 654 (E.D. Mich. 2006).

<sup>458</sup> The production costs of for downloadable content are much lower than for retail. See Chris Morris, *How downloadable content is saving the PS3/360 development model*, *VARIETY* (Mar. 5, 2009) [http://weblogs.variety.com/the\\_cut\\_scene/2009/03/in-the-past-few-weeks-ive-been-doing-two-things-that-tie-together-quite-nicely-thinking-about-the-video-game-business-econo.html](http://weblogs.variety.com/the_cut_scene/2009/03/in-the-past-few-weeks-ive-been-doing-two-things-that-tie-together-quite-nicely-thinking-about-the-video-game-business-econo.html).

<sup>459</sup> See Sweeny, *supra* note 445.

there is no question that the limitations on video developers would begin to infringe on individual freedoms of creative expression as well. User-generated conduct,<sup>460</sup> while currently less expansive than originally predicted, is still a significant contributor to video game content. There are top-ten lists for user-generated games and iPhone or iPad applications,<sup>461</sup> revealing how pervasive some user-generated content can be. If legislation regulating online video game content is enacted to follow suit with California's video game regulation, user-generated content will inevitably become an area of conflict as individuals will be subject to tailoring their own creative expressions. Thus, there is potential for video game regulation to threaten personal First Amendment freedoms in a very serious way.

In recognizing the economic hit that the video game industry will inevitably take if California's statute is upheld as constitutional, there will also be a ripple effect on employment. California is the largest employer of game software personnel, comprising approximately 41% of the total number of U.S. workers in the video game publishing industry.<sup>462</sup> The decrease in video game revenue that would likely result, should California's statute be enforced, would lead to loss of jobs in California's already depressed job market.<sup>463</sup> Additionally, in 2009, the value that the entertainment software industry added to the United States' gross domestic product was \$4.95 billion.<sup>464</sup> Thus, on a larger scale, decreases in the earnings of the video game industry will negatively impact the contributions to the United States economy.<sup>465</sup>

Lastly, the passage of any future regulation regarding the distribution of violent video games would most likely trigger the enactment of similar legislation across the country. Thus, the economic and creative impact felt locally would spread across the country.

Despite the outcome in *Brown v. Entertainment Merchants Ass'n*, there is no guarantee that such a decision is a "clear-cut win."<sup>466</sup> In light of the Court's

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<sup>460</sup> See Nadia Oxford, *Why User Generated Content Hasn't Boomed*, GAMETHEORY (Oct. 7, 2010), <http://gametheoryonline.com/2010/10/07/why-user-generated-content-hasnt-boomed/>.

<sup>461</sup> See Lawrence Bonk, *Best Video Games Driven By User Generated Content*, BESTCOVERY (Jan. 18, 2011), <http://www.bestcovery.com/best-video-games-driven-user-generated-content>; Christopher Mack, *ISG's Top 10 Games & Apps Built with User Generated Content*, INSIDE SOCIAL GAMES (Jan. 19, 2009), <http://www.insidesocialgames.com/2009/01/19/isgs-top-10-games-apps-built-with-user-generated-content>; *Best Implementation of User Generated Content*, GAMESPOT, <http://www.gamespot.com/best-of-2010/special-achievement/index.html?page=19> (last visited on Nov. 14, 2011).

<sup>462</sup> Stephen E. Siwek, *Video Games in the 21<sup>st</sup> Century: The 2010 Report*, ENTERTAINMENT SOFTWARE ASSOCIATION, 27, [http://www.thesa.com/facts/pdfs/VideoGames21stCentury\\_2010.pdf](http://www.thesa.com/facts/pdfs/VideoGames21stCentury_2010.pdf) (last visited Nov. 14, 2011). Along with California, Washington, Texas, New York, Massachusetts and Illinois make up a 75% majority of the total number of employees working in the computer and video game publishing industry. *Id.*

<sup>463</sup> See Alana Semuels, *Job Losses Cut Wide Swath in California*, LOS ANGELES TIMES (Sept. 18, 2010), <http://articles.latimes.com/2010/sep/18/business/la-fi-0918-caljobs-20100918>. At the time this article was written, California had lost around 113,000 jobs since August 2009 across all employment sectors. *Id.*

<sup>464</sup> See Siwek, *supra* note 462, at 27. "An industry's value-added is 'the contribution of industries to the Nation's output,' or gross domestic product." *Id.* at 22.

<sup>465</sup> See *id.*

<sup>466</sup> Matthew Kato, *A Legal Matter: We ask a constitutional law expert about the Supreme Court video game hearing*, GAMEINFORMER, Jan. 2011, issue 213, at 30.

decision that there may some day be a constitutional law regulating video game distribution, state legislatures may continue to test the boundaries with new statutes and laws aimed at fitting within the constitutional confines set by the Supreme Court. Only time will tell.<sup>467</sup>

#### VIII. CONCLUSION

Throughout history, society has repeatedly cried “wolf” whenever a new form of media emerges. While the initial panic often results in strict regulations on the distribution and creation of such media, inevitably it becomes apparent that there is no “wolf” to be afraid of. Most recently, the “wolf” has taken the form of violent video games; however, the Supreme Court has held that California’s cry is nothing more than a false alarm. Although such a decision was expected and the Supreme Court has firmly established that new categories of unprotected speech cannot be added to the existing categories of obscenity, fighting words, and incitement, there is no guarantee that the cry of “wolf” will be silenced for long. While the decision marks a definitive victory for the video game and entertainment industries, video games are simply the latest medium to cause society concern, and it is unlikely that they will be the last.

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<sup>467</sup> *See id.*